Liminal Immigration Law

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ABSTRACT: Liminal immigration rules operate powerfully beyond the edge of traditional law to govern the movement of people across borders and their interactions with the immigration system within the United States. This Article illuminates this body of “liminal law,” revealing how agencies and advocates have innovated to create widely followed rules that operate like traditional legal rules but are not. These rules are law-like, or liminal, in that they stand apart from “hard” law like statutes, regulations, or judicial opinions, but exert a similar authority. Because of their liminal nature, these rules lead a precarious existence and are often in transition, tending either toward codification or toward extinction. They are nonetheless sticky, resisting their own demise. The Article employs case studies of three liminal rules—the Deferred Action for Childhood Arrivals program, the mandatory immigration detainer, and administrative closure—to illustrate the characteristics and the potency of liminal immigration law.

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INTRODUCTION

Liminal immigration rules—potent mandates that are poised between formal law and informal norms—are central to many of the most impactful developments in immigration law in the last several decades. In 2017, President Trump struck a blow to a popular—and precarious—institution in immigration governance called Deferred Action for Childhood Arrivals (“DACA”) that protected nearly 800,000 undocumented resident youth from
the threat of deportation. Dismantling DACA seemed simple for an incoming president who could merely undo what had been done to create DACA: announce the change from the White House and issue an agency memo to implement the announcement. In fact, a similar program for parents of U.S. citizens and lawful permanent residents had withered after a district court judge enjoined it in 2015. Yet DACA outlived the Trump Administration. It remained, in every meaningful manner, just as it was when Trump took aim at it in 2017. Trump targeted DACA because it was extraordinarily effective at staving off mass deportation. It survived because, despite its fragility, it was unexpectedly sticky. Its ephemeral appearance belied its tensile core.

DACA established a liminal legal rule, a potent command not to deport those within its protection. Liminal law is not positive law. It lacks the formality of traditional legal rules like statutory law, common law, and administrative rulemaking, yet it operates in ways that are at least as powerful. At the same time, liminal law is gossamer and vulnerable to destruction. Despite the fragility of its appearance, liminal law is sticky, withstanding assault without appreciable change. Liminal rules are also, by their nature, in perpetual transition: moving either toward formal recognition as legislation, regulation, or precedent, or in the opposite direction toward elimination.

This Article divines the characteristics of liminal laws through an examination of three transformative moments in immigration law that created three powerful liminal legal rules. First, the DACA program created a form of lawful presence for a class of undocumented noncitizens, essentially by establishing a liminal rule protecting them from deportation. Its power lay in conferring on recipients the attributes of legitimacy—authorization to work, access to valid identity documents, freedom of movement within the United States, and temporary immunization from deportation—transforming these individuals’ immigration status from “undocumented” to a recognized, documented presence. The result was a precarious protection from

2. See infra Section I.B.1.
3. See Texas v. United States (Texas I), 787 F.3d 733, 734 (5th Cir. 2015); Texas v. United States (Texas II), 809 F.3d 134, 146 (5th Cir. 2015), aff’d by an equally divided court, 579 U.S. 547 (2016).
4. See infra Section I.B.1.
5. See infra Section II.A.1.
6. See infra Section II.B.1.
deportation that provided those that held it with a precarious intermediate status. 8

The second liminal legal rule arose from an immigration enforcement operation called “Secure Communities.” 9 Secure Communities instituted a nationwide practice by Immigration and Customs Enforcement (“ICE”) agents of issuing immigration “detainers” that convinced state and local officials to prolong their custody of targeted arrestees solely for immigration enforcement purposes. 10 Secure Communities relied on a liminal legal rule: that the ICE detainer imposed a mandatory obligation on state and local law enforcement officials to continue to hold an individual in custody. 11 The power of this liminal rule resided in the authority that a government form seemed to impart permitting the police to bypass the usual requirements of probable cause or a hearing.

Third, the use of administrative closure of immigration cases as a form of relief from removal constitutes a different type of liminal rule. 12 Following a legislative legalization of unauthorized residents in 1986, immigration courts employed administrative closure to stave off deportation for tens of thousands of long-term residents and clear the way to legalization. 13 Through this practice, the power of an immigration judge to administratively close a deportation matter—in the absence of explicit statutory authorization—coalesced into a liminal rule. That rule prioritized pathways to stable immigration status over avenues to deportation.

DACA, the so-called mandatory immigration detainer, and administrative closure are but three examples of liminal legal rules. This Article highlights them as examples of liminal law, because they have drawn public and professional attention and illustrate the profound impact liminal immigration law can have. Liminal rules make indentations in the operation of immigration law.

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12. See infra Section I.B.3.
13. See infra Section I.B.3.
compel action, constrain conduct, and channel discretion. Because liminal rules are by and large easier and faster to create than immigration statutes or regulations, they are more adept at entering liminal spaces. They create flexibility in immigration law when pressure for legal change mounts, but traditional avenues of legal revision are ossified. Their legitimacy is open to contest, as is apparent from the political storm around DACA, the legion of lawsuits challenging the detainer, and the attempts to do away with administrative closure. It is this contested legitimacy of liminal rules and their resilience in the face of challenges that leads to their transitional nature, as they are pushed or pulled from more to less substantial states and back again.

Liminality in immigration law is at the cutting edge of the new functionalism in immigration scholarship, building on sociologist Cecilia Menjívar’s groundbreaking work on liminal legality and Luin Goldring’s description of the “precarious status” of noncitizens without sanctioned permanent residence. Jennifer Chacón has elegantly described how immigration law can produce liminal legal subjects, such as DACA recipients, who slip “in and out of protective states of administrative grace” in which they are protected from criminal and immigration enforcement but remain “structurally . . . ‘invisible,’” “neither here nor there.” These liminal legal subjects are, as a result of their invisibility, vulnerable to forms of marginalization that are themselves less visible and so less accountable.

Geoffrey Heeren has defined “nonstatus,” a legally ambiguous state in which the government recognizes an otherwise unauthorized individual’s presence

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14. See infra Part III.
18. Id.
19. Heeren, supra note 7, at 1129–33.
in the country. Joining DACA as examples of nonstatus are parole, deferred enforced departure, and temporary protected status. Finally, Nina Rabin has mapped "a spectrum of [legal] precarity." She describes the subordinating effect of the legal limbo of liminal status, illuminating how "legal backlogs" consign those with liminal status to "an extremely limited life at the margins of society."

These scholars have evocatively mapped the liminal status of noncitizens. This project builds on their valuable contributions to identify liminal rules that shape not just liminal status, but the larger tapestry of the governance of migration in the United States. This Article defines liminal law and explores its effectiveness and persistence. It explains how liminal law responds to changes in policies, practices, and evolving understandings of membership. Despite the calcification of statutory immigration law, liminal law allows the law on the ground—operative immigration law—to flex and sway. Despite its apparent fragility, liminal rules are structurally sound enough to stand against attempts to eliminate them.

The Article makes two critical contributions beyond articulating the concept of liminal immigration law. First, it traces the origins of liminal immigration law and defines its characteristics. These liminal rules arise when agencies, courts, and advocates innovate at the edges of their delegated power, creating new rules that shape agency authority in new ways. We use the liminal rules embedded in DACA, the detainer, and administrative closure as case studies to apply these characteristics and show how liminal rules have powerfully shaped our current immigration landscape. Second, we lay liminal law alongside traditional forms of law to gain insight into the composition of

20. Id.

21. Id. at 1134–36 (describing parole as a program designed to provide individualized relief in sympathetic cases but not bestow an immigration "status"); see Immigration and Nationality Act of 1952 (McCarran-Walter Act), Pub. L. No. 82-414, § 212(d)(5), 66 Stat. 163, 188 (codified as amended at 8 U.S.C. § 1182(d)(5)).

22. Heeren, supra note 7 at 1129–32 (describing deferred enforced departure as assent from the U.S. government to remain in the United States and legally work, without conferring formal immigration status); see also 8 C.F.R. § 241.6 (2022) (defining requisites for an administrative stay of removal).

23. 8 U.S.C. § 1254a(b)(1) (2018), McCarran-Walter Act § 244(b)(1); see Heeren, supra note 7, at 1140 (explaining that DHS can temporarily protect from deportation "nationals of any foreign state . . . experiencing civil strife, environmental disaster, or other extraordinary conditions" when removal "would pose a serious threat to their safety"); see also Shoba Sivaprasad Wadhia, The Role of Prosecutorial Discretion in Immigration Law, 9 CONN. PUB. INT. L.J. 243, 264–65 (2010) (hereinafter Wadhia, The Role of Prosecutorial Discretion in Immigration Law) (tracing the development of deferred enforced departure, extended voluntary departure, and temporary protected status); Shoba Sivaprasad Wadhia, The Rise of Speed Deportation and the Role of Discretion, 5 COLUM. J. RACE & L. 1, 6-9, 24 (2014) (noting that ICE may use prosecutorial discretion to issue supervision orders instead of enforcing an order of removal).


25. Id.
law itself. We also lay bare the implications of a set of influential rules that exists only liminally, rules that operate with broad practical impact but less transparency and substance than traditional law.

Part I traces the formation of liminal immigration law. It explains how the ossification of traditional forms of immigration law and pressures for change from both the immigrant community and the enforcement agencies inspired the innovations of liminal rules. This Part then describes the appearance of three unlikely legal reforms, the attempts to undo them, and the story of their survival.

Part II introduces the defining characteristics of liminal law and shows how they manifest in three significant case studies: DACA, the Secure Communities program, and the administrative closure rule that immigration courts employ as a soft form of relief from removal. Through these examples, this Part will demonstrate how liminal law can be at the same time robust, precarious, sticky, and in flux.

Part III explores what liminal law can tell us about the substance and value of law. It suggests that the existence and scope of liminal law reflect the racialization of immigration law. It begins by locating liminal law in the lexicon of legal rules. It then theorizes how liminal law arises, why it exists and persists, and who it impacts. This Part posits that liminal law’s operation reflects a racialized division of the power and stability of legal rules. Finally, it suggests that liminal law is more widespread in immigration law than the three examples we provide here and points toward other areas of law where liminal rules may operate.

I. THE ORIGINS OF LIMINAL IMMIGRATION LAW

Liminal immigration law arose when traditional avenues for reforming immigration law ossified. This Part describes how intense pressure for immigration policy change due to political discord over immigration and the criminalization and racialization of immigration policing, combined with the vacuum created by statutory immobility, led to the formation of liminal legal rules. After describing the barriers to the development of traditional law, this Part sets out three liminal legal rules that have had major impacts on the regulation of migration in the United States.

26. See infra Part I.
27. See infra Part I.
28. See infra Part I.
29. See infra Part II.
30. See infra Part III.
31. See infra Part III.
32. See infra Part III.
33. See infra Part III.
A. THE OSSIFICATION OF TRADITIONAL IMMIGRATION LAW

Immigration law in the United States has ossified. The lack of contemporary immigration legislation contrasts sharply with the extraordinary scope of power and judicial deference that Congress enjoys when legislating immigration policy. This Congress has historically had a lively interest in wielding that immigration superpower, fashioning and re-fashioning the immigration laws in response to major shifts in U.S. society. In the 1920s, amidst an economic depression and growing isolationism from international affairs, Congress responded to waves of immigration from southern and eastern Europe with legislation intended to attain a white, Anglo-Saxon population.

In 1921, Congress imposed admissions quotas to selectively constrict migration based on country of origin. It revised those laws three years later in an attempt to replicate the northern European demographics of the 1890 census. In combination with the nineteenth century Asian exclusion laws, the quota legislation resulted in admissions policies that heavily favored immigration from the United Kingdom.

World War II and the Cold War inspired a flurry of legislative reworkings of immigration law. War in the 1930s and 1940s led to a comprehensive nationality code, preventing the admission of “dangerous” aliens, repealing Chinese exclusion laws in favor of quotas, and funding the Bracero Program that brought Mexican laborers into the agricultural fields of

34. See Chae Chan Ping v. United States, 130 U.S. 581, 604, 609 (1889) (declaring that Congress had broad plenary power to regulate immigration law rooted in the nation’s sovereignty that required judicial deference to the political branches); Fong Yue Ting v. United States, 149 U.S. 698, 711–13 (1893) (extending the plenary power to deportation); see also Harisiades v. Shaughnessy, 342 U.S. 580, 587–91 (1952) (finding that expulsion “is a weapon of defense and reprisal confirmed by international law as a power inherent in every sovereign state”); Arizona v. United States, 567 U.S. 387, 394–95 (2012) (“The . . . United States has broad, undoubted power over the subject of immigration and the status of aliens.”).


36. Id.


the United States.\textsuperscript{43} In the 1950s, fear of communism drove Congress to expand political grounds for excluding and expelling noncitizens.\textsuperscript{44}

The civil rights activism of the 1960s\textsuperscript{45} and geopolitical concerns that racial discrimination was negatively impacting foreign policy during the Cold War\textsuperscript{46} led Congress to strip overt racial distinctions from the Immigration and Nationality Act ("INA"). During the 1960s and 1970s, legislation newly recognized refugees and provided for their admission.\textsuperscript{47} Throughout, Congress reformed the precarious status of many noncitizens by permitting them to obtain lawful permanent resident status through formally registering their presence in the country.\textsuperscript{48}

The two decades after the 1970s saw a new trend in immigration legislation. In 1986, the Immigration Reform and Control Act ("IRCA")\textsuperscript{49} exchanged a formal amnesty for many unlawfully present people for a significant

\begin{itemize}
\item \textsuperscript{43} See generally Farm Labor Appropriation Act of 1943, Pub. L. No. 78-45, 57 Stat. 70 (providing funding to support an adequate supply of agricultural workers); Agricultural Act of 1951, Pub. L. No. 82-78, 65 Stat. 119 (amending the Agricultural Act of 1949); see also Kitty Calavita, Inside the State: The Bracero Program, Immigration, and the I.N.S. 20–27 (1992) (reporting that the Bracero Program initially began as a binational agreement between the United States and Mexico before Congress officially endorsed the Program in Public Law 45 in 1943).
\item \textsuperscript{44} Immigration and Nationality Act of 1952 (McCarran-Walter Act), Pub. L. No. 82-414, § 212(a), 65 Stat. 165, 182–85 (codified as amended at 8 U.S.C. § 1182); see also Mitchell C. Tilner, Ideological Exclusion of Aliens: The Evolution of a Policy, 2 Geo. Immigr. L.J. 1, 56–70 (1987) (observing that the McCarran-Walter Act attempted to include nearly every ideological belief that might be subversive for the purpose of excluding and expelling noncitizens).
\item \textsuperscript{46} David S. FitzGerald & David Cook-Martín, The Geopolitical Origins of the U.S. Immigration Act of 1965, Migration Pol'y Inst. (Feb. 5, 2015), https://www.migrationpolicy.org/article/geopolitical-origins-us-immigration-act-1965 [https://perma.cc/38V6-897H] (concluding that “[t]he shift away from ethnic selection in U.S. immigration policy was primarily a response to foreign policy pressures emanating from the growing number of independent Asian, African, and Latin American countries that sought to delegitimize racism” during World War II and the Cold War).
\end{itemize}
expansion of immigration policing tools. Major immigration statutes after IRCA continued to expand enforcement, interwove immigration and criminal law, and restricted avenues for relief from deportation. In sum, until the turn of the twenty-first century, Congress regularly responded with new immigration legislation to social upheaval, economic shifts, and political and demographic factors.

After the turn of the century, legislation braked and halted. With isolated exceptions, Congress passed no meaningful immigration legislation after the wave of legislation in the mid-1980s and the 1990s. Despite a series of unsuccessful efforts to pass statutory immigration reform, no immigration

50. See generally id. (conferring lawful permanent residency on millions of undocumented residents, instituting employer sanctions for hiring unauthorized employees, and criminalizing some immigration-related conduct).


legislation made major changes to admissions or relief from removal. The IRCA marked the last legislative moment that significantly expanded opportunities to enter lawfully or that regularized the status of noncitizens unlawfully present in the United States.

As immigration legislation ossified, pressure mounted for immigration reform, leading to recurring calls for a major statutory overhaul. The population of unauthorized residents grew significantly after the INA. With the same hand that Congress used to strip out racial selection from immigration law, it had for the first time placed stringent limits on migration within the Western hemisphere. Even as the rate of growth steadied, the passage of time froze the precarious status of undocumented residents and their communities within the United States. A progressively increasing share of the unlawfully present population fell under the expansive “crimmigration” laws of the last wave of enforcement legislation. Undocumented youth, coming of age as Americans outside of the law, found powerful ways to tell their story through social and political activism. These dynamic forces advocating for social transformation rubbed up against the calcified channels for traditional legal change.


59. See MOTOMURA, IMMIGRATION OUTSIDE THE LAW, supra note 57, at 29.


61. See id. at 99 (describing the defeat of the DREAM Act despite a favorable political climate).
At the same time, the advent of crimmigration law and the prioritization of immigration enforcement drove a massive increase in the size of the enforcement agencies, an expansion of their duties, and a new relationship between state and local criminal law actors and immigration enforcement actors. These changes similarly exerted pressure for new developments in immigration law.

Why did statutory change in immigration policy ossify despite such widespread pressure for reform? While a comprehensive analysis is beyond the scope of this Article, several reasons present themselves that relate to the development of liminal law. First, immigration became a front-burner political issue at a moment when the national political parties were experiencing enduring obstacles to bipartisan agreement.

Second, the intertwining of immigration and criminal law in the modern era conflated the unlawfully present noncitizen with the “criminal alien,” complicating efforts at reform. In the 1980s and 1990s, rhetoric about immigrants increasingly tied immigration to national security and criminalization. Congress restricted relief from deportation and punished unauthorized border crossing by barring lawful re-entry for periods of three or ten years or longer. It expanded grounds for inadmissibility and deportability to include almost all crimes except non-drug-related, single misdemeanors.

This increasing association between immigrants and crime was racialized. The trope of the “illegal alien” was strongly associated with Latinos, particularly Mexican citizens. Latinos were being deported and detained at much higher rates than any other ethnicity.


64. See Stumpf, The Crimmigration Crisis, supra note 58, at 419.

65. See id.

66. See Chacón, Overcriminalizing Immigration, supra note 58, at 618.


69. See Yolanda Vázquez, Perpetuating the Marginalization of Latinos: A Collateral Consequence of the Incorporation of Immigration Law into the Criminal Justice System, 54 HOW. L.J. 659, 666 (2011) (hereinafter Vázquez, Perpetuating) (“[I]n . . . 2009, Latinos accounted for approximately 94% of deportations as well as the total number of noncitizens removed for criminal violations.”); Yolanda Vázquez, Race and Border Control: Is There a Relationship?, BORDER CRIMINOLOGIES (Apr. 6, 2015),
immigration law violation or selective enforcement or structural bias,\(^70\) the effect was that the face of the immigration violator in the public mind was Latino.

The expansive statutory framework for crimmigration, along with the strong association between the criminal alien and disfavored groups, drained political will.\(^71\) It stymied legislative change that would expand immigration status or strengthen legal protections for noncitizens or racial groups identified with immigration.\(^72\) In this way, crimmigration legislation led both to halting statutory change and to dampening political will to reform an immigration system now clouded by this association with crime. Crimmigration also intensified calls from those experiencing its effects for new approaches in immigration law and policy.\(^73\)

Other traditional avenues for development of law besides legislation—formal rulemaking and administrative decision-making—also encountered opposition and reversal. Notice-and-comment rulemaking became contested...
and therefore more rare. Congress curtailed the discretion of immigration judges and agency officials to grant relief from deportation.

As for judicial development of immigration law through Article III courts, courts have taken an active role in interpreting immigration statutes, but that role is circumscribed. Long-standing doctrines of deference to Congress's plenary power over immigration limit constitutional challenges. Jurisdiction-stripping statutes unique to immigration law constric the role of the federal judiciary in developing the law. Congress placed statutory prohibitions on

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77. E.g., Kerry v. Din, 576 U.S. 86, 87 (2015) (relying on the plenary power doctrine in deferring to Congress’s immigration policies); Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 210 (1953) (“[T]he power to expel or exclude aliens [i]s a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.”); Fong Yue Ting v. United States, 149 U.S. 698, 707 (1893) (“The right of a nation to expel or deport foreigners . . . is as absolute and unqualified as the right to prohibit and prevent their entrance into the country.”); Chae Chan Ping v. United States, 130 U.S. 581, 606 (1889) (declaring that the judiciary must defer to the power of the legislature to exclude "foreigners of a different race . . . who will not assimilate with us").

judicial review of agency discretion and removal outcomes and restrictions on large-scale tools for judicial review such as class actions. These constrictions on judicial review led courts to take less direct paths to review of immigration law. They have injected “phantom constitutional norms” into immigration law through statutory interpretation and subjected agency action to scrutiny under administrative law or preemption doctrines.

B. The Rise of Liminal Immigration Law

The pressure for change in immigration law encountered the vacuum of traditional law reform, forming the crucible for liminal immigration law. Three case studies exemplify the liminal rules that were created in this crucible: DACA, the immigration detainer, and administrative closure in immigration court. We chose these examples for several reasons. Individually, each has had a major impact on immigration policy by revising immigration policy and practice on a national level. Together, they illustrate the diversity of liminal immigration rules, from bestowing protection from deportation to expanding deportation tools. Immigration detainers are enforcement-oriented and further crimmigration and deportation, whereas DACA and administrative closure protect individuals from deportation and resist the expansion of crimmigration. Finally, comparing them illustrates the very different contexts in which liminal rules arise, from the top of the executive branch in the case of DACA, to the accretion of enforcement practices in the case of the immigration detainer, to the judicial context in which administrative closure operates.

These examples demonstrate the power and durability of liminal law and its capacity to shape how immigration law functions on the ground. The three liminal rules have distinct origins and different effects, and they govern diverse actors and issues within immigration law and policy. However, they share the same three characteristics. They are robust, wielding the power of traditional law. Though appearing vulnerable to rescission, they are sticky in that they resist attempts to snuff them out. Finally, liminal rules operate in a state of transition, moving either toward formalization as traditional law, or toward extinction.


81. See Motomura, Phantom Constitutional Norms, supra note 76, at 549–50.


83. See infra Part III.
1. The Origin of Deferred Action for Childhood Arrivals

The DACA program established both a liminal rule and a liminal immigration status. The crimmigration trends of the 1980s and 1990s, criminalizing noncitizens and ramping up southern border controls, disrupted the historical patterns of circular migration across the U.S.-Mexico border. Instead, workers came and stayed in the United States, and families followed. By 2000, there were 8.6 million undocumented immigrants in the United States, of whom about 1.5 million were children.

These families settled in the communities in which they worked. Undocumented children grew up in U.S. communities, but without access to registry or other formal inclusion through immigration status. Coming of age as an undocumented youth meant learning that U.S. society and U.S. law categorized them as no different from other excluded groups: as criminalized, isolated, and invisible to all except enforcement authorities. Their undocumented status foreclosed them from opportunities that their peers enjoyed, including attending college, working in a chosen field, and living without fear of expulsion from the country.


86. See id.; Hiroshi Motomura, We Asked for Workers, but Families Came: Time, Law, and the Family in Immigration and Citizenship, 14 VA. J. SOC. POL’Y & L. 103, 103–06 (2006) [hereinafter Motomura, We Asked for Workers, but Families Came] (describing as “chronic failure” a one-dimensional perception of immigrants as workers unconnected with families and observing that family-based admissions constitute seventy-five to eighty percent of U.S. immigrant admissions).


89. See Vargas, supra note 88; see also Jennifer M. Chacón, Citizenship Matters: Conceptualizing Belonging in an Era of Fragile Inclusions, 52 U.C. DAVIS L. REV. 1, 27–37 (2018) [hereinafter Chacón, Citizenship Matters] (observing that commonly recurring fears for undocumented residents include impediments to movement, limitations on work and educational opportunities, constant fear of deportation, and harm to overall social standing).

90. See Chacón, Citizenship Matters, supra note 89, at 27–37; Nicholls, supra note 60, at 2–4.
Deportations of these undocumented residents and their families drew public attention. Their stories were in tension with narratives about crimmigration and security risks from unrestricted immigration. Despite barriers to formal pathways to political and social change such as voting, undocumented youth built a movement that ultimately influenced the legal criteria for DACA: youth, formative time in the United States, and the potential for contributing to society.

Hope lay initially in legislation. Immigrant youth, dubbed “Dreamers,” pushed for passage of the DREAM Act, a bill that would create a legal status and a pathway to U.S. citizenship. Introduced as a bipartisan bill in 2001, the DREAM Act carved out of the general population of undocumented residents a group defined both by youth and a dual conception of innocence: Those too young to bear responsibility for crossing the border or remaining beyond a visa deadline and with a clean criminal record other than non-drug-related misdemeanors.

The narrow defeat of the DREAM Act in 2010 was a tremendous blow to the Dreamers. It opened a rift with established advocacy groups and


95. Id. § 3(a)(1). Critiques of the DREAM Act included its limitations based on age and school enrollment, and broad exclusion of those unable to show “good moral character” under the immigration laws, among other things. See Dream Act of 2017, S. 1615, 115th Cong. § 3(b)(1)(B)–(C) (2017); Dream Act of 2017, H.R. 3440, 115th Cong. §§ 3(b)(1)(B)–3(b)(C) (2017); Cecelia M. Espenoz, Relief for Undocumented Students: The Dream Act a Piece of the Puzzle in Overall Immigration Reform or a Puzzle With Missing Pieces?, 56 FED. LAW. 44, 48 (2009); JEANNE BATALOVA & MICHAEL FIX, MIGRATION POL’Y INST., NEW ESTIMATES OF UNAUTHORIZED YOUTH ELIGIBLE FOR LEGAL STATUS UNDER THE DREAM ACT 4–5 (2006), https://www.migrationpolicy.org/sites/default/files/publications/Background1_Dream_Act.pdf [https://perma.cc/DqNE-3XNB] (observing that not all eligible beneficiaries of the DREAM Act would be able to join the military or go to college).
compelled the Dreamers to adopt more innovative forms of social and political activism.96 They pushed the Obama Administration for a solution.97

The Administration’s first attempt was largely a failure. In June 2011, the Director of Immigration and Customs Enforcement issued two memos instructing ICE agents and other enforcement personnel to exercise discretion negatively, refraining from arresting and pursuing deportation of those, like the Dreamers, at the bottom of the enforcement priority list.98

In 2012, the Administration unveiled DACA, providing a form of prosecutorial discretion called “deferred action” that bestowed temporary protection from deportation.99 President Obama announced the initiative in a speech in the Rose Garden, and Janet Napolitano, Secretary of the Department of Homeland Security, issued a memo setting out its scope and coverage.100 DACA largely mirrored the provisions of the DREAM Act in defining who was covered. Deferred action bestowed no legal status, but it offered a renewable two years of protection from removal and permitted temporary work authorization.101 Two years later in 2014, the Obama Administration created the Deferred Action for Parents of Americans and Lawful Permanent Residents (“DAPA”) allowing undocumented parents of
U.S. citizens and lawful permanent residents to obtain deferred action and work authorization.\textsuperscript{102} The priority-setting memo, DACA, and DAPA were unpopular with enforcement personnel, and in 2012, the union of ICE agents brought suit seeking their retraction.\textsuperscript{103} Several states banded together to challenge DACA as beyond the authority of the agency.\textsuperscript{104} The district court struck down DAPA along with an extension of the DACA program; however, it allowed incumbent DACA recipients to retain their deferred action protection.\textsuperscript{105} A divided Supreme Court upheld the ruling.\textsuperscript{106}

In September 2017, responding to heavy pressure from his base, President Donald Trump attempted to retract DACA and end the protections that thousands had obtained since 2012.\textsuperscript{107} His administration issued a memo declaring that DACA was unconstitutional, lacked a statutory foundation, and presented a litigation risk.\textsuperscript{108}

The 2017 memo retracting DACA was immediately challenged as contrary to the Administrative Procedure Act (“APA”) and unconstitutionally racially motivated.\textsuperscript{109} In 2020, the Supreme Court rejected the Trump

\begin{itemize}
\item \textsuperscript{105} Texas v. United States, 86 F. Supp. 3d 591, 677–78 (S.D. Tex. 2015), aff’d, Texas v. United States (Texas II), 809 F.3d 134 (5th Cir. 2015).
\item \textsuperscript{106} United States v. Texas, 579 U.S. 547, 548 (2016).
Administration’s withdrawal of DACA on narrow grounds but laid out a pathway by which the Administration might lawfully dismantle the program. Before the Administration could regroup, Trump lost the 2020 election. In January 2021, President Joseph Biden resurrected the DACA memo in one of his first acts as President. Seven months later, the Biden Administration promulgated a regulation to implement DACA’s provisions.

2. The Roots of the Mandatory Immigration Detainer

Concurrently with the events that gave rise to DACA, another liminal rule arose requiring police to hold noncitizens in custody when ICE officials provided notice that the noncitizen was of interest to the agency. Called a “detainer,” this do-not-release rule contributed to the Obama Administration earning the distinction of deporting over five million people, more than any previous administration.
The do-not-release rule was an element of a larger program called Secure Communities, connecting federal immigration enforcement functions with state and local police and sheriffs nationwide. Secure Communities sought to leverage for immigration purposes the regular contact that state and local law-enforcement officials had with noncitizens stopped for or convicted of crimes. The program identified suspected immigration violators by giving immigration enforcement officials access to a national database of state and federal criminal arrestees. Once immigration officials identified an individual for investigation, however, they were faced with the problem of assuming custody of the person before state or local officials released the individual.

The mandatory immigration detainer was their solution. An understanding grew up around the Secure Communities program that a federal immigration detainer obligated the arresting sheriff or police department to keep the noncitizen in custody until federal officials arrived. Issuance of detainers, which had hovered at just over 5,000 annually in 2003 and 2004 and rocketed to nearly 310,000 by 2011.

The practice of complying with the detainer continued until 2014, when a series of court decisions declared the practice unconstitutional. Facing the prospect of considerable damage awards, states and localities across the nation adopted policies declining to comply with the detainers. In November 2014, the Department of Homeland Security terminated Secure Communities, citing its constitutionally questionable nature and substantial...
opposition to its operation. The detainer became a request, rather than a mandate.

This shift in the nature of the ICE detainer from mandate to request became a stumbling block for the Trump Administration’s attempt to revive Secure Communities. As the country polarized around the election results, scores of local jurisdictions either declared themselves to be “sanctuary” jurisdictions that declined detainer requests or publicly embraced the Secure Communities program and the detainer. The constitutionally suspect nature of the detainer and the deportation orientation of the Trump Administration had compelled localities to affirmatively choose whether to reconstruct the do-not-release rule on a local level.

In September 2021, President Biden’s administration issued new immigration enforcement priorities, putting terrorist threats, current threats to public safety, and recent border crossers at the top of the enforcement priority list. It de-emphasized individuals suspected only of lacking immigration status. The memo directed officials to carry out the Administration’s priorities using discretion in determining whether to pursue arrest, issue detainers, and seek removal. The Supreme Court granted certiorari after lower courts split over whether the priorities likely violated the

124. See id. (declaring that Secure Communities “has attracted a great deal of criticism, is widely misunderstood, and is embroiled in litigation; its very name has become a symbol for general hostility toward the enforcement of our immigration laws”).

125. See, e.g., Galarza, 745 F.3d at 640–42, 645 (construing the immigration detainer as a request to states and localities rather than as a requirement, thereby clearing the path to finding a municipality liable when it relied on an immigration detainer to hold a U.S. citizen); see also Stumpf, De(veloping Discretion, supra note 10, at 1283 (discussing DHS Secretary Johnson’s demotion of the detainer from a federal mandate to a request).


129. Id. at 2.

130. Id.
APA, leaving in place a district court injunction that had maintained the Trump Administration’s enforcement priorities.131

3. The Rise of Administrative Closure as Relief from Removal

The third case study is the use of administrative closure of immigration court cases as a functional substitute for relief from removal. An immigration judge’s administrative closure of a removal case retracts it from the docket temporarily but without rescheduling, making the case closure indefinite.132 Immigration judges use administrative closure when noncitizens have a pathway to immigration status that a removal order would foreclose.133 A judge may also use it when a noncitizen has no current avenue for lawful status but removal would interfere with significant ties the noncitizen has to the United States such as marriage to a U.S. citizen.134 Typical situations in which administrative closure can prevent or delay removal are cases in which a visa petition is pending with the United States Citizenship and Immigration Services (“USCIS”) or when a noncitizen is pursuing a direct appeal or post-conviction relief in a criminal case.135

To initiate administrative closure, either the noncitizen or the government files a motion to administratively close the case, or the judge may sua sponte inquire about closure in low-priority cases.136 If one party opposes, the

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131. United States v. Texas, No. 22A17 (22-58), 2022 WL 2841804, at *1 (July 21, 2022) (mem.) (granting certiorari before judgment to review a Texas district court’s preliminary injunction of the priorities memo); see Arizona v. Biden, 40 F.4th 375, 387, 396 (6th Cir. 2022) (upholding the priorities memo against an APA challenge); Texas v. United States, No. 21-cv-0016, 2022 WL 2109204, at *1−2, *25−34 (S.D. Tex. June 10, 2022) (holding that the priorities memo violated the APA); Texas v. United States, 40 F.4th 205, 228–30 (5th Cir. 2022) (declining to stay the district court’s vacatur of the priorities memo, reasoning that the memo likely violated the APA).


133. See id.


136. See NAT’L IMMIGRANT JUST. CTR., supra note 135, at 3.
immigration court determines whether to grant the request for administrative
closure using criteria gleaned from precedent.137 Once administratively
closed, the case remains off the court’s docket unless a party successfully
moves to reinstate the case on the docket.138 Most cases are decided quickly
after such re-calendaring.139

Administrative closure took form as a liminal rule beginning in 2011,
when the Obama Administration set specific criteria for the exercise of
prosecutorial discretion in pursuing removal.140 The criteria allowed for
prosecutorial dismissal of proceedings or agreement to close cases.141 This
approach aimed to preserve resources for pursuing crime-based or national
security-related removals by removing from the docket lower priority cases
involving noncitizens with family ties, community contributions, or military
service.142

Like DACA, the use of administrative closure as a form of relief from
removal arose not through legislation or a regulation, but through a White
House announcement and an agency memo confirming the immigration
courts’ authority to close cases and the use of closure to pursue the enforcement
priorities.143 This memo, together with a 2012 Board of Immigration Appeals
(“BIA”) decision legitimizing administrative closure, established the contours
of the rule and the authority of immigration judges to implement it.144

The history of administrative closure is a roller coaster. Immigration
judges began the practice of closing cases on their dockets soon after the

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137. See Avetisyan, 25 I. & N. Dec. at 694 (“[W]e hold that the Immigration Judges and the
Board [of Immigration Appeals] have the authority . . . to administratively close proceedings . . .
even if a party opposes.”).

138. See U.S. DEP’T OF JUST., EXEC. OFF. FOR IMMIGR. REV., IMMIGRATION COURT PRACTICE
the effect of administrative closure and its criteria), reaffirmed by Matter of Cruz-Valdez, 28 I. & N. Dec.

139. The Life and Death of Administrative Closure, supra note 132 (reporting that most re-calendared
cases are decided within an average of four months).

140. See supra note 98 and accompanying text.

141. Cecilia Muñoz, Immigration Update: Maximizing Public Safety and Better Focusing Resources,
WHITE HOUSE BLOG (Aug. 18, 2011, 2:00 PM), https://obamawhitehouse.archives.gov/blog/20
11/08/18/immigration-update-maximizing-public-safety-and-better-focusing-resources [https:/

142. See The Life and Death of Administrative Closure, supra note 132.

143. See Morton Memo, supra note 98, at 3, 5–6. This DHS memo also set the enforcement
criteria meant to protect undocumented resident youth prior to the DACA program. See supra
notes 92–98 and accompanying text.

144. See Matter of Avetisyan, 25 I. & N. Dec. 688, 694 (B.I.A. 2012) (“[W]e hold that the
Immigration Judges and the Board [of Immigration Appeals] have the authority . . . to
administratively close proceedings . . . even if a party opposes.”), reaffirmed by Matter of Cruz-
establishment of the immigration court system in 1983. In 1984, a memo from a government official condoned using administrative closure in cases when an individual failed to appear. After the IRCA provided for legalization of many noncitizen residents without stable immigration status, immigration judges used administrative closure extensively between 1986 and 1990, staving off deportation for those applying for lawful permanent residence under the new law. Administrative closures constituted almost a quarter of all case closures between 1986 and 1990, removing close to 80,800 cases from the docket.

At that point, the BIA limited this power, first by restricting its use when another avenue was available such as issuing an in absentia order. In 1990 and 1996, BIA decisions established that any party could veto a case closure, effectively delegating to government attorneys the power to determine whether an immigration judge would close a case. Administrative closure rates nosedived, dropping to less than four percent of all case completions and remaining there until its 2012 reawakening.

In 2017, the Trump Administration began a sustained campaign to eliminate administrative closure. First, the Department of Homeland Security (“DHS”) revoked the memo that had set prosecutorial discretion priorities.

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145. The Life and Death of Administrative Closure, supra note 132 (documenting 376,439 cases in which administrative closure was used to temporarily or permanently remove a proceeding from the court’s active calendar).


148. See The Life and Death of Administrative Closure, supra note 132.

149. Id.


152. See The Life and Death of Administrative Closure, supra note 132.

153. See Memorandum from John Kelly, Sec’y, U.S. Dep’t of Homeland Sec., to Kevin McAleenan, Acting Comm’r, U.S. Customs & Border Prot., Thomas D. Homan, Acting Dir., U.S.
Second, Attorney General Jeff Sessions declared in *Matter of Castro-Tum* that immigration judges “lack a general authority to grant administrative closure.”\textsuperscript{154} The administration then proposed a regulation that would have eliminated administrative closure by “mak[ing] clear that there is no freestanding authority of line immigration judges or BIA members to administratively close cases.”\textsuperscript{155}

These changes had a tremendous impact. Case closures based on prosecutorial consent plummeted, from nearly 25,000 in 2016 to about 8,500 in 2017.\textsuperscript{156} In 2019, there were a bare seven instances of administrative closure involving prosecutorial discretion.\textsuperscript{157} *Castro-Tum* nearly halted grants by immigration courts, which dropped from over 27,000 grants in 2016 to 503 by 2019.\textsuperscript{158} By the end of 2019, administrative closure was moribund, constituting less than one percent of all case completions.\textsuperscript{159}

Yet, administrative closure persisted. With the departure of the Trump Administration, administrative closure revived. In March 2021, a nationwide injunction halted the regulation that would have essentially codified *Castro-Tum*’s stripping of administrative closure authority.\textsuperscript{160} In July 2021, Attorney General Merrick Garland reversed *Castro-Tum*, restoring closure authority to immigration judges.\textsuperscript{161} And in September 2021, DHS Secretary Alejandro Mayorkas issued a memo reinstating prosecutorial discretion and setting broad enforcement priorities to be implemented across the agency.\textsuperscript{162}

In alignment with the DHS memo, the Executive Office for Immigration Review (“EOIR”), which oversees the immigration courts, directed immigration judges to actively employ administrative closure consistently with the DHS

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\textsuperscript{156} See The Life and Death of Administrative Closure, supra note 132.

\textsuperscript{157} Id.

\textsuperscript{158} Id.

\textsuperscript{159} Id.


\textsuperscript{162} See Mayorkas Prosecutorial Discretion Memo, supra note 128, at 2–4.
enforcement priorities. It instructed judges to encourage pre-hearing resolution of administrative closure issues, offering it as a tool to clear low-priority cases to make room for cases fitting the DHS enforcement priorities and those in which the noncitizen sought adjudication of the case.

The effect of these changes and reversals was to re-establish administrative closure as a form of relief from removal. Administrative closure narrowed formal removal orders to a prioritized set of cases and criteria and imposed a “do-not-remove” rule for the remainder.

II. RECOGNIZING LIMINAL IMMIGRATION LAW

Liminal law results from the clash between ossified immigration law and the pressure for social change. The creation and persistence of DACA, the rise and fall and rise again of the immigration detainer, and administrative closure are three examples of liminal rules that are as potent as traditional legal rules. In spite of their ephemeral appearance, liminal rules are surprisingly resistant to change. We call these rules “liminal,” because they hover between a traditional legal rule and an informal norm.

Other scholars have offered glimpses of liminal law. The concept of liminal rules owes much to Hiroshi Motomura’s seminal work on immigration outside of the law, phantom norms, and the role of discretion in immigration enforcement. Jill Family has written about the law-like stature that immigration policy manuals and other government documents can acquire, rising from the body of administrative “soft” law. Scholarship on the

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164. Id.

165. See Chacón, Producing Liminal Legality, supra note 7, at 764–65 (“[R]ights protection has required . . . engagement in political acts that assert previously unacknowledged rights into existence.”).

166. See id. at 710, 719; Heeren, supra note 7, at 1129–33 (describing a related concept of liminal status). See generally Menjívar, supra note 15 (explicating liminality as applied to immigration status).


oversized role of discretion,\textsuperscript{169} the ad hoc instrumentalism of immigration enforcement,\textsuperscript{170} a “shadow sanction” system of enforcement,\textsuperscript{171} and the bottom-up nature of immigration law rules\textsuperscript{172} throws into relief the shadowy substance of liminal immigration law.

This Part builds on these scholars’ work by defining liminal immigration law through its three hallmarks. First, liminal legal rules are robust. They wield outsized power in relation to their ephemeral status when compared with traditional legal forms such as statutes, regulations, and case law. Liminal rules act like formal legal rules, with the strength and vitality to have a substantial effect in the real world such as authorizing physical custody or providing protection from deportation.

Second, liminal legal rules are sticky—they are hard to dislodge. They appear fragile, vulnerable to an unraveling of their informal genesis or to reversal through changes in formal legal rules. And yet, they resist elimination. The activism or innovation that brought them into being sustains them; the pathways they create through practice and the passage of time roots them, rendering them resistant to change.

Third, liminal legal rules are in perpetual transition. Because they sit at the threshold of formal law, and are often buffeted by controversy, liminal law tends to move toward either formal recognition or toward extinction.

The three case studies—DACA, the mandatory ICE detainer, and the administrative closure of immigration litigation—illustrate these characteristics.


\textsuperscript{170} See Shalini Bhargava Ray, \textit{Immigration Law’s Arbitrariness Problem}, 121 COLUM. L. REV. 2049, 2053 (2021) (describing the collection of informal, discretionary agency tools of forbearance from deportation, including deferred action, administrative closure, and orders of supervision as a system of unregulated “shadow sanctions”).

\textsuperscript{171} See Joseph Landau, \textit{Bureaucratic Administration: Experimentation and Immigration Law}, 65 DUKE L.J. 1173, 1188–89, 1198 (2015) (defining “bottom-up” immigration law as the ability of frontline officers, such as field agents and adjudicating officers, to implement immigration law on a day-to-day basis, exercising discretion based on guidance in policy memoranda).
LIMINAL IMMIGRATION LAW

A. LIMINAL LAW IS ROBUST

Liminal law is not traditional “hard” law, but it can be just as potent. Liminal law is difficult to recognize as “law” because, while it may use traditional law as a touchstone, it does not take the form of a statute, regulation, precedent, or executive order. Yet liminal law is robust: It has the same effect as traditional law in that it is cloaked with authority to compel compliance, change behavior, and establish norms.

Robustness refers to the degree to which non-traditionally created rules carry the same sort of power and breadth that traditionally created legal rules do. Like traditional legal rules, liminal rules set norms that agencies, individuals, and entities widely follow. In fact, liminal law can create the illusion that it is a form of traditional law, even when it is not.

1. DACA and the Do-Not-Deport Rule

DACA is a prime example of a robust nontraditional legal rule. The DACA program temporarily immunized thousands of noncitizens from immigration enforcement.\(^{173}\) It acts as a talisman against deportation, prohibiting immigration agents from removing the DACA recipient.\(^{174}\) That power to grant a temporary reprieve from removal resides in a regulation governing deferred action, a form of relief from removal that has been part of the immigration agency's toolbox for decades.\(^{175}\) However, DACA's specific criteria combined with its effect—its power to protect a population of resident youth—set it apart from the everyday operation of discretion at the rank-and-file level.\(^{176}\) The rule that DACA created—that a specific group of unlawfully present individuals could obtain at least temporary immunity from deportation—is a liminal legal rule.

DACA fits the first characteristic of a liminal legal rule. It is not the result of a statute or formal regulation, nor is it a judicial pronouncement. Its origin is distinct from and more casual than the processes that create statutes,

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173. See generally DACA Memo, supra note 100 (protecting applicable individuals from deportation). See also Chacón, Producing Liminal Legality, supra note 7, at 718–19 (explaining how “[s]everal recent executive actions offer certain noncitizens temporary deportation relief without legal status,” including DACA); Nicholls, supra note 60, at 153–54 (providing that DACA granted some temporary relief while simultaneously denying access to certain privileges of citizenship); Hiroshi Motomura, The President’s Dilemma: Executive Authority, Enforcement, and the Rule of Law in Immigration Law, 55 Washburn L.J. 1, 5 (2015) [hereinafter Motomura, The President’s Dilemma] (“Approval of a DACA application provides certain noncitizens with a temporary two-year reprieve from deportation in the form of ‘deferred action.’”).

174. See supra notes 99–102 and accompanying text.

175. See 8 C.F.R. § 274a.12(c)(14); Wadhia, The Role of Prosecutorial Discretion in Immigration Law, supra note 25, at 264–65 (paraphrasing definitions and distinctions between Deferred Enforced Departure, Extended Voluntary Departure, and Temporary Protected Status).

176. See ADAM B. COX & CRISTINA M. RODRÍGUEZ, THE PRESIDENT AND IMMIGRATION LAW 105, 179 (2020) (arguing that DACA should be understood as not "having eliminated discretion but as promoting the centralization of discretion within the bureaucracy").
regulations, and judicial precedent. DACA is widely—and erroneously—believed to have originated via a 2012 executive order of President Obama. In fact, no such executive order exists. Instead, the President’s announcement of the program in a 2012 speech in the Rose Garden together with a DHS memo established the parameters of the program. This memo paved the way for another document that would serve as the heart of the program: Form I-821D, to be completed and submitted to the USCIS. Those documents act as the medium through which individuals and agencies actuate the “do-not-deport” rule of DACA.

At the same time, DACA has the power of traditional law. Like statutes, regulations, and precedent, DACA articulates a legal rule and defines its scope. It regulates authority within the government, transferring governance of the covered population of undocumented resident youth from enforcement officials to USCIS. Most importantly, the rule that DACA establishes is robust, because it renders unlawful the expulsion of DACA holders. In defining DACA’s core, the Supreme Court pointed to this impact of DACA, distinguishing it from the collateral conferral of benefits that ordinarily result from a grant of deferred action. A final measure of DACA’s potency is its impact, extending protection from deportation to more than 600,000 recipients as of June 2022.

The Supreme Court recognized DACA’s robustness in rebuffing the Trump Administration’s attempt to rescind the program. In determining that the rescission decision was reviewable, the Court relied on DACA’s conferral

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178. See supra notes 99–102 and accompanying text.

179. U.S. CITIZENSHIP & IMMIGR. SERVS., supra note 109 (providing the option to download the form).

180. See Alyse Bertenthal, Speaking of Justice: Encounters in a Legal Self-Help Clinic, 39 POL. & LEGAL ANTHROPOLOGY REV. 261, 266 (2016) (offering a vision of “justice” as the familiar, mundane tasks of legal practice, including filling out forms).

181. DACA Memo, supra note 100, at 2–3; COX & RODRÍGUEZ, supra note 176, at 179–80 (describing the shift of implementation of DACA from ICE to USCIS).

182. DHS v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1911 (2020) (declaring that “[t]he defining feature of deferred action is the decision to defer removal”); see also Texas v. United States, 5 F.4th 498, 522–23 (5th Cir. 2022) (noting that more than “800,000 individuals have obtained forbearance under” the DACA memo).


184. See Regents of the Univ. of Cal., 140 S. Ct. at 1906–07.
of “affirmative immigration relief.” 185 For the Court, DACA’s grant of forbearance from removal and its accompanying benefits gave the program sufficient heft to make it reviewable under the APA. 186

Controversy over a failed do-not-deport rule similar to DACA highlights DACA’s robustness. DAPA would have allowed certain undocumented parents of U.S. citizens and lawful permanent residents to apply for deferred action. 187 Like DACA, DAPA was not named in a specific statute, regulation, or executive order. It originated from a presidential announcement and an agency memo and was to be implemented similarly by way of a government form and a DHS process. 188

DAPA was not long for this world. It was almost immediately enjoined in a lawsuit that twenty-six states brought against both DAPA and a planned expansion of the DACA program. 189 The challenge to DAPA split the Fifth Circuit panels in two related appeals. 190 The disagreement between the majority opinions and the dissents centered on the robustness of the rule DAPA (and DACA) embodied and how closely it resembled the way a traditional legal rule operates. In considering whether the notice and comment requirements of the APA applied, 191 the controversy centered on whether DAPA “modify[ed] substantive rights and interests” in the way a legislative rule would (therefore constituting invalid agency overreaching) or was instead within the agency’s legislatively delegated discretion. 192 In the majority’s view, the power that the agency memo claimed, to confer lawful presence on 500,000 people who would receive work authorization and eligibility for driver’s licenses, was sufficiently similar to legislation to render it invalid under the APA. 193 The dissents made two arguments: that DAPA was

185. Id.

186. Id. (explaining that “[b]ecause the DACA program is more than a non-enforcement policy, its rescission is subject to review under the APA”).

187. DAPA Memo, supra note 102, at 3–5.


189. See cases cited supra note 3; see also Muzaffar Chishti & Faye Hipsman, Supreme Court DAPA Ruling a Blow to Obama Administration, Moves Immigration Back to Political Realm, MIGRATION POL’Y INST. (June 29, 2016), https://www.migrationpolicy.org/article/supreme-court-dapa-rulin g-blow-obama-administration-moves-immigration-back-political-realm [https://perma.cc/B5KD-WQ77] (“[DAPA’s] implementation was quickly challenged by Texas and 25 other states, and enjoined in February 2015 by Andrew Hanen, a federal district judge in Brownsville, Texas.”).

190. See Texas v. United States (Texas I), 787 F.3d 733, 734 (5th Cir. 2015); Texas v. United States (Texas II), 809 F.3d 134, 146 (5th Cir. 2015), aff’d by an equally divided court, 579 U.S. 547 (2016).


192. Texas II, 809 F.3d at 176; cf. Texas v. United States, 50 F.4th 498, 511–13 (5th Cir. 2022) (discussing this aspect of DAPA when affirming the vacatur of DACA).

authorized by statute and established regulations, connected umbilically to
traditional law,\textsuperscript{194} and that DAPA was “executive action that is internal policy-
setting” rather than “a procedurally invalid legislative rule.”\textsuperscript{195}

In staking out these three positions, the opinions emphasized the robust
nature of the do-not-deport rule embedded in DAPA and DACA. What the
majority and dissents agreed on is the power and scope of the rule. All
acknowledged that if deferred action applied to an individual, it was
effectively a prohibition on deportation. The dispute between the majority
and the dissents was over whether this particularly impactful rule was properly
categorized as a traditional agency rule, because it was authorized by statute
directly or through a valid delegation of discretion or was, instead, so similar
to legislation as to be improper. Between these positions—the traditional
agency rule and positively enacted legislation—lies a liminality: a do-not-
deport rule with a liminal nature.

The legality of DAPA\textsuperscript{196} is not the focus of this Article. The dispute over
how to categorize the rule is important, because it illustrates that DAPA, and
its cousin DACA, act enough like traditional law to wield a similar level of
power. While questions may linger about the relationship between DACA and
DAPA and traditional legal authority, these questions arise because the programs
established a mandate and demanded compliance in the same way as a statute
or regulation or other traditional form of law.

2. Detainers and the Do-Not-Release Rule

The immigration detainer is a different example of these robust law-like
mandates. The detainer is an enforcement tool, directing state and local law
enforcement to continue custody of an individual that ICE suspects of violating
immigration law. Like DACA, the detainer’s do-not-release rule had a national
impact on state and local police jurisdictions nationwide. Moreover, it was
essentially a creature of its own making, with a tenuous connection to
traditional law.

The two sources of traditional law related to the detainer do not account
for the robustness of its do-not-release rule. In 1986, the Anti-Drug Abuse Act
authorized the use of an immigration detainer for controlled substance
arrests.\textsuperscript{197} The language of the Act is narrow. It specifies that detainers apply

\begin{itemize}
  \item \textsuperscript{194} Texas II, 809 F.3d at 189 (King, J., dissenting) (“[T]he benefits of which Plaintiffs
  complain are not conferred by the DAPA Memorandum . . . but are inexorably tied to DHS’s
  deferred action decisions by a host of unchallenged, preexisting statutes and notice-and-
  comment regulations . . . .” (citing generally DAPA Memo, supra note 102)).
  \item \textsuperscript{195} Texas I, 787 F.3d at 776–77 (Higginson, J., dissenting) (dissenting from the denial of a
  stay of the preliminary injunction).
  \item \textsuperscript{196} See generally Texas I, 787 F.3d 733 (raising legitimacy issues of agency overreach); Texas
  II, 809 F.3d 134 (discussing legal consequences associated with standing and DAPA generally).
  \item \textsuperscript{197} See Anti-Drug Abuse Act of 1986, ch. 46, § 1751, 100 Stat. 3207, 3207-47 to -48; see also Lasch,
  Enforcing the Limits, supra note 114, at 182–85; César Cuauhtémoc García Hernández, Immigration
\end{itemize}
to controlled substance offenses and provides that a federal, state, or local criminal law enforcement official may initiate the request that an immigration official issue a detainer. It also limits detainer requests to circumstances when the law enforcement official "has reason to believe that the [noncitizen entered unlawfully] . . . or . . . is not lawfully present in the United States." Unless the noncitizen is otherwise detained by other officials, DHS "shall effectively and expeditiously take custody of the" noncitizen.

The regulation implementing detainer authority did not limit its use to drug offenses, claiming instead a general federal authority to arrest and detain. The regulation characterized the detainer as "a request" to criminal law enforcement agencies to "advise the Department, prior to release of the alien, in order for the Department to arrange to assume custody . . . when gaining immediate physical custody is either impracticable or impossible." It also authorized police or sheriffs to maintain custody of the individual: Upon receiving a detainer, the law enforcement official "shall maintain custody of the alien for a period not to exceed [forty-eight] hours, excluding Saturdays, Sundays, and holidays in order to permit assumption of custody by the Department.

These statutory and regulatory sources bear little resemblance to the broad operation of the detainer as implemented nationwide in the mid-2000s. Despite the forty-eight-hour limit on custody on the face of the detainer form, individuals remained in local jails significantly longer, with one study finding an average period of two weeks to a month, and sometimes up to forty-three days. Detainers resulted in thousands of individuals being detained for lengthy periods, including hundreds wrongfully detained because they were

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198. 8 U.S.C. § 1357(d) (permitting ICE to issue a detainer when a "law enforcement official" arrests a noncitizen "for a violation of any law relating to controlled substances").
199. Id. § 1357(d)(1).
200. Id. § 1357(d).
202. 8 C.F.R. § 287.7(a).
203. Id. at § 287.7(d).
either U.S. citizens or had other lawful immigrant status. Over time the immigration detainer acquired an aura of mandatory federal authority. Both the regulation and the detainer form were inconsistent about whether the detainer mandated that the state or local police to continue to hold the person in custody or whether the detainer was merely a federal request.

Yet state and local law enforcement agencies across the nation came to understand the detainer as mandatory, requiring them to hold a noncitizen for as long as necessary for immigration officials to take custody. The power of the ICE detainer, and the essence of its liminality, was its national—nearly uniform—acceptance as a federal mandate to law enforcement agencies not to release the targeted individual. Almost every sheriff and every police department in the nation acceded to it as a matter of course. Deportation metrics shot skyward.

205. _Id._ at 4 (finding that in a three-year period, in the three states studied, ICE wrongfully issued detainers for at least 189 individuals who were not subject to removal proceedings because they were U.S. citizens or had other legal immigrant status). The Eighth Circuit struck down a similar county practice impacting U.S. citizens as unconstitutional discrimination on the basis of national origin. _Parada v. Anoka County, No. 21-3082, 2022 WL 17333380, *1–2 (8th Cir. Nov. 30, 2022)_ (determining that a Minnesota county jail’s policy of holding in custody for ICE investigation every detainee born outside the United States, including U.S. citizens, violated the Equal Protection Clause).


207. _See Preston, supra note 206_.

208. _See Lasch, Preempting Immigration Detainer Enforcement, supra note 206, at 288 (describing state and local compliance with detainers and the increasing resistance to them after 2010); Stumpf, _Devolving Discretion, supra note 10, at 1278–79 (noting an increase in litigation over the scope and legality of detainers after 2010 as localities sought to untangle themselves from detainer requirements); Sreenivasan et al., _supra note 204, at 10_ (describing ICE detainers); _see, e.g., Miranda-Olivares, 2014 WL 1414305, at *3_ (observing that Clackamas County viewed the detainer as mandatory); _Galarza v. Szalczuk, 745 F.3d 634, 639–40 (3d Cir. 2014)_ (noting that Lehigh County viewed the detainer as mandatory). _But see, e.g., Mercado v. Dallas Cnty., 229 F. Supp. 3d 501, 514–15 (N.D. Tex. 2017)_ (rejecting the County’s argument that immigration detainers were mandated by 8 C.F.R. § 287.7(d)), _abrogated on other grounds by City of El Cenizo v. Texas, 890 F.3d 165 (5th Cir. 2018). But see also Julia Preston, _States Resisting Program Central to Obama’s Immigration Strategy, N.Y. TIMES_ (May 5, 2011), https://www.nytimes.com/2011/05/06/us/06immigration.html [https://perma.cc/9EG3-NZKQ] (reporting that Department of Homeland Security Secretary Janet Napolitano had declared that Secure Communities was “mandatory”).

209. _See Latest Data: Immigration and Customs Enforcement Removals ICE Data, TRAC IMMIGR._ (June 2020), https://trac.syr.edu/phptools/immigration/remove [https://perma.cc/CF73-7CYB] (documenting record numbers of deportations in fiscal years 2008 to 2020); _see also The Role of ICE Detainers Under Bush and Obama, TRAC IMMIGR._ (Feb. 1, 2016), https://trac.syr.edu/immigration/reports/458 [https://perma.cc/HU34-6JQV] (reporting that the number of detainers resulting in deportation peaked in March 2010).
As with DACA, a government form played a central role in effectuating this liminal rule. The original detainer form exuded federal authority: a signature block for a federal immigration official and the seal of the federal Department of Homeland Security. The mandate appeared in bold as an imperative on the face of the form: “MAINTAIN CUSTODY OF ALIEN FOR A PERIOD NOT TO EXCEED 48 HOURS.” Further down the page, the form referred to the detainer as a “request[]” to “[m]aintain custody” for no more than forty-eight hours beyond when the noncitizen would otherwise have been released. It then informed the recipient in bold that “you are not authorized to hold the subject beyond these 48 hours,” implying that the immigration agency had imbued the state or local law enforcement agency with forty-eight hours of administrative detention power. That show of authority was powerful enough to establish nationwide police cooperation with the detainers despite strong counterpressure from advocates.

The notion that the immigration detainer was in fact a mandate to nonfederal law enforcement officials was dubious from the start. The Tenth Amendment prohibits federal commandeering of state agents. Neither the statute, the regulation, nor the form itself clearly mandated obedience to the detainer. The detainer statute contemplated state or local initiation of the

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211. Id.
212. Id.
213. Id. In Miranda-Olivares, Clackamas County argued that the detainer was mandatory, based in part on the form’s caption, which instructed in all capitals that the County was to “(‘MAINTAIN CUSTODY OF ALIEN FOR A PERIOD NOT TO EXCEED 48 HOURS’).” Miranda-Olivares, 2014 WL 1414305, at *5. The County also pointed to the body of the form which asserted that the authority for ICE to order the County to detain “flows from federal regulation 8 C.F.R. § 287.7, which provides that a law enforcement agency ‘shall maintain custody of an alien’ once a detainer has been issued by DHS.” Id. Clackamas County further explained that it interpreted “shall” as extinguishing any discretion by a local law enforcement agency once ICE issues the detainer.” Id.; see also Lasch, Rendition Resistance, supra note 9, at 205–08 (analyzing Form I-247 and the uncertainty raised by the language used in different versions).
215. See U.S. CONST. amend X. See generally Printz v. United States, 521 U.S. 898 (1997) (standing for the proposition that the federal government cannot commandeerm the official services of local officers); see also Lasch, Federal Immigration Detainers, supra note 114, at 700 (describing the Tenth Amendment challenge to the detainer regulation as commandeering state and local officials).
detainer.216 The regulation characterized the detainer as a request, as did the detainer form.217 The Fourth Amendment loomed once probable cause for the initial stop expired, putting in question the constitutionality of continued custody based on the detainer form.218

Yet the habit of obedience to the detainer was so ingrained that the mandatory detainer rule continued to exert its influence even after the original basis for probable cause to arrest was gone.219 Despite the limited statutory and regulatory authority, in practice, detainers were used for arrests of any sort and for prolonged periods of custody that extended far beyond forty-eight hours.220

The mandatory detainer thus acquired an aura of compulsion and a breadth of impact that rendered it robust. It was potent enough to dictate the actions of nonfederal officials and influential enough to convince a nation of criminal law enforcement professionals to obey a seeming mandate to prolong the custody of countless individuals.

3. Administrative Closure and the Do-Not-Remove Rule

Like DACA and the mandatory detainer rule, administrative closure originated beyond traditional law but had tremendous impact on removals of noncitizens. The use of administrative closure as a comprehensive barrier to removal is not explicitly described in a statute or regulation—that use is liminal, existing in the penumbra of traditional law.221 Still, the “do-not-remove” rule of administrative closure has the shape and power of a traditional legal rule.

The relationship between traditional law and administrative closure was at the heart of legal challenges to its existence. Many agency powers derive

216. See supra notes 197–200 and accompanying text.
217. See supra notes 209–13 and accompanying text.
218. Miranda-Olivares, 2014 WL 1414305, at *9–10 (concluding that “it was not reasonable for the Jail to believe it had probable cause to detain Miranda-Olivares based on the box checked on the ICE detainer”).
219. Compare Miranda-Olivares, 2014 WL 1414305, at *11 (finding Miranda-Olivares’s detention was extended beyond the probable cause period “based exclusively on the ICE detainer”), with City of El Cenizo v. Texas, 890 F.3d 164, 186–88 (5th Cir. 2018) (rejecting a Fourth Amendment facial challenge to a state statute requiring compliance with immigration detainers (citing Senate Bill 4, TEX. GOV’T CODE ANN. § 752.053 (West 2017))).
220. See Lasch, Enforcing the Limits, supra note 114, at 171–82 (highlighting "ICE practices in Irving, Texas [as] emblematic of the" indiscriminate use of ICE detainers); Molly F. Franck, Note, Unlawful Arrests and Over-Detention of America’s Immigrants: What the Federal Government Can Do to Eliminate State and Local Abuse of Immigration Detainers, 9 HASTINGS RACE & POVERTY L.J. 55, 56–57, 72–74 (2012) (noting that in practice, detainers are used to justify detention far beyond the forty-eight-hour rule, sometimes extending weeks or months beyond the required release).
221. See supra Section I.B.3.
from broad statutory delegations.\textsuperscript{222} While statutory interpretation can fill gaps in legislative pronouncements, too much distance from statutory or regulatory authority can doom administrative rules.\textsuperscript{223} In Castro-Tum, Attorney General Sessions drew on this concept of statutory distance to declare that “administrative closure” was not authorized by statute or regulation, nor delegation from the Attorney General.\textsuperscript{224}

Later, in his opinion overruling Castro-Tum, Attorney General Garland relied on the broad language of regulations authorizing immigration judges to “take any action consistent with their authorities . . .” that is appropriate and necessary for the disposition of [their] cases.\textsuperscript{225} Citing the long history of administrative closure, the Attorney General reinstated the immigration courts’ authority to use it, at least until a new regulation was promulgated.\textsuperscript{226}

Setting aside the merits of these decisions, the tussle over authority for administrative closure illustrates the gap between traditional law and liminal legal rules.\textsuperscript{227} Despite the tenuousness of the connection to formal law, the do-not-remove rule of administrative closure operates like a traditional legal rule. Unlike a pure exercise of administrative discretion, administrative closure as a form of relief from removal has specific criteria shaped by precedent.\textsuperscript{228} The breadth of its use as a form of relief stems from the agency memos that direct immigration prosecutors and judges toward applying closure regularly.

\textsuperscript{222} E.g., Mistretta v. United States, 488 U.S. 361, 372 (1989) ("[I]n our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.").


\textsuperscript{226} Id. at 328–29.

\textsuperscript{227} See Ray, supra note 171, at 2083–84.

\textsuperscript{228} See supra Section I.B.3 (describing the development of precedent recognizing administrative closure and the reasons for granting it); Matter of Avetisyan, 25 I. & N. Dec. 688, 696 (B.I.A. 2012) (listing as factors for consideration: "(1) the reason administrative closure is sought; (2) the basis for any opposition to administrative closure; (3) the likelihood the respondent will succeed on any petition, application, or other action he or she is pursuing outside of removal proceedings; (4) the anticipated duration of the closure; (5) the responsibility of either party, if any, in contributing to any current or anticipated delay; and (6) the ultimate outcome of removal proceedings (for example, termination of the proceedings or entry of a removal order) when the case is re-calendared before the Immigration Judge or the appeal is reinstated before the Board"), reaffirmed by Matter of Cruz-Valdez, 28 I. & N. Dec. at 329; Bohman, supra note 151, at 209–10 (listing and critiquing the limits on these factors).
except if the case is a removal priority or the individual favors proceeding with the case.229

These directives made administrative closure a regular rather than an exceptional outcome. They also established the purpose for administrative closure: to adjudicate only cases that meet the criteria, leaving the remainder to be resolved in other ways or not at all.230 They graduated the do-not-remove mandate of administrative closure to a liminal rule.

The impact of administrative closure also reflects its robustness. Administrative closure has had a powerful influence on expulsion of noncitizens. Compared to an annual average of about 11,000 cases in the fifteen years prior to 2020, immigration judges administratively closed an average of over 17,500 cases per year in the four years between 2012 and 2017.231 As Nina Rabin has noted, administrative closure, in combination with continuances and similar measures, “kept removal from becoming imminent, and allowed for a degree of social integration during the years that the visa application kept [people] in limbo.”232

B. LIMINAL LAW IS STICKY

The second characteristic of liminal law is that it is sticky.233 Traditional law, such as a statute, a regulation, or a published court decision, is durable by design. Revising or abolishing traditional law requires overcoming barriers built into the processes for changing the law: passing repeal legislation, rescinding a regulation, overturning or modifying a precedent through new cases and appeals, striking down legislation, or invalidating regulations.234

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229. See supra notes 143–46 (describing agency memos establishing administrative closure criteria and scope).
230. See Family, Immigration Adjudication Bankruptcy, supra note 135, at 1042–45.
231. See The Life and Death of Administrative Closure, supra note 132.
232. See Rabin, supra note 15, at 592 (“ICE and/or the immigration courts were highly likely to terminate or administratively close [noncitizens’] proceedings upon discovery of a pending visa application, or at least grant continuances generously to allow time for adjudication of the visa application.”).
233. See Dan M. Kahan, Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem, 67 U. CHI. L. REV. 607, 607–09 (2000) (coining the term “sticky” to describe norms that resist change, and arguing that lawmakers should apply “gentle nudges” rather than “hard shoves” in changes to the law in order to avoid resistance due to sticky societal norms).
Structural barriers to change are design features of traditional law. They operate to stabilize the law, ensuring that once created, a legal rule will endure unless significant effort is expended to change it. Liminal law seems far more precarious. It has none of these stabilizing features, although as we will see, it performs a stabilizing function. Eliminating liminal law appears to merely require a new executive proclamation or a new agency memo that retracts the old one. In theory, officials could unilaterally and expediently eliminate DACA, the mandatory ICE detainer, and administrative closure’s relief function by undoing the steps that created them. They could consign to obsolescence the forms these rules rely on. They could shutter or change the agency systems that received, processed and adjudicated the relief or enforcement requests. In fact, each of these liminal rules have undergone efforts to get rid of them. Yet because of their stickiness, each survived.

1. The Stickiness of DACA

DACA is a clear example of the stickiness of liminal rules even in the face of their precariousness. DACA’s origins drew a roadmap to its ostensibly easy elimination. When President Trump sought to rescind DACA in 2017, his administration simply backtracked the steps that the Obama Administration had taken to establish it. Mirroring President Obama’s speech in the Rose Garden announcing the creation of DACA, President Trump made a public statement that he would rescind DACA. Undoing Secretary Napolitano’s 2012 issuance of the foundational DACA memo, President Trump’s Acting
Secretary of Homeland Security issued the memo that declared DACA unlawful. As the Supreme Court noted in the challenge to that action, “[t]he dispute before the Court is not whether DHS may rescind DACA. All parties agree that it may.” What had been so simply done could simply be undone.

Nevertheless, DACA turned out to be extraordinarily sticky. The prolonged efforts of the Trump Administration to eliminate DACA illustrate its resistance to termination. At a campaign rally in 2016, candidate Donald Trump promised to end DACA, declaring that he would “immediately terminate President Obama’s two illegal executive amnesties.” After the election, when President Trump faced the reality of terminating the program, DACA’s stickiness emerged. The President wavered, declaring that he “love[s] these kids . . . and” that he “[found] it very hard doing what the law says exactly to do.” Only after public shaming from influential members of his base did he order DACA’s termination.

Even then, the first move to rescind DACA was so vulnerable to judicial review as to raise eyebrows about the sincerity of the attempt. Instead of laying out policy reasons for rescinding the program, Acting Secretary of Homeland Security Elaine Duke relied wholly on Attorney General Jeff Sessions’s letter concluding that DACA was contrary to legal doctrine. This purely doctrinal rationale for rescission presented a broad target for an APA challenge. Three district courts immediately blocked the rescission. The Supreme Court agreed that DHS had unlawfully failed to consider the option of continuing the policy of forbearance from deportation without collateral

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240. DACA Memo, supra note 100; Duke Memo, supra note 108.
241. DHS v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1905 (2020).
245. See Duke Memo, supra note 108; Regents of the Univ. of Cal., 140 S. Ct. at 1911–15 (observing that “[Acting Secretary] Duke did not appear to appreciate the full scope of her discretion” when she issued the memorandum winding down DACA).
246. See Duke Memo, supra note 108; Regents of the Univ. of Cal., 140 S. Ct. at 1912 (noting that Acting Secretary Duke had the discretion to “remove[] benefits eligibility while continuing forbearance,” but that “[s]he instead treated the Attorney General’s conclusion regarding the illegality of benefits as sufficient to rescind both benefits and forbearance, without explanation”).
benefits like work authorization, and it had also failed to consider any reliance interests by DACA recipients. The Court declined to address the post-litigation policy reasons offered in the later rescission memo from DHS Secretary Kirstjen Nielsen.

DACA continued to boomerang between termination and stability. In December 2020, a federal district court in New York issued an injunction requiring the DHS to continue to accept new DACA applications. Seven months later in July 2021, a Texas district court judge declared that DACA violated the APA and enjoined the Administration from granting the initial DACA applications that the New York district court had ordered the agency to accept.

In August 2022, DHS promulgated a regulation that essentially codified DACA using the notice-and-comment process of the APA. Just as the regulation was set to go into effect, the Fifth Circuit affirmed the Texas district court’s conclusion that DACA violated the APA. It stayed the injunction against DACA, however, until the district court reviewed the new DACA rule. The Fifth Circuit’s holding maintained the status quo for current DACA recipients, allowing USCIS to continue to accept DACA renewals.

DACA’s near-death experiences demonstrate both its precarity and its stickiness. DACA had survived, though not unscathed. As Jennifer Chacón noted, “DACA protections proved somewhat ‘sticky’ in ways that its supporters hoped it would” but the litigation boomerang had “left the program on a grim life support system.” While the means of creating the program had seemed to inscribe DACA with the instructions for its dissolution, the do-not-deport rule at its heart proved notably difficult to undo.

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248. See Regents of the Univ. of Cal., 140 S. Ct. at 1913 (stating that “the rescission memorandum contains no discussion of . . . the option of retaining forbearance without benefits” and that “Duke also failed to address whether there was ‘legitimate reliance’ on the DACA Memorandum” (quoting Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 742 (1996))).

249. Id. at 1907–10 (stating that “Secretary Nielsen[] . . . offered three ‘separate and independently sufficient reasons’ for the rescission” of DACA, but that they were “impermissible post hoc rationalizations” not properly before the Court (citation omitted)).


254. Id.

255. Id. at 529–30.

256. Chacón, Citizenship Matters, supra note 89, at 43–44 (“Even before the attempted rescission of [DACA], the immigration enforcement efforts of the Trump administration highlighted the fragility of DACA.”).

257. DAPA is a useful contrast as a nontraditional legal rule that lacked stickiness. DAPA’s do-not-deport rule toppled almost immediately when the Fifth Circuit enjoined its implementation; the government later retracted it. See Texas v. United States (Texas II), 809 F.3d 134, 186 (5th
2. The Stickiness of Detainers

The mandatory immigration detainer provides a still earlier example of a seemingly precarious yet sticky liminal rule. In 2012, an Oregon resident challenged as unconstitutional a county sheriff’s decision to hold her in prolonged custody pursuant to an immigration detainer.258 The Oregon district court ruled that the detainer was a request and not a mandatory rule, exposing the county to liability for unlawful arrest without probable cause.259 The decision exposed the doctrinal and practical instability of the rule that the detainer was mandatory for law enforcement. It opened counties and cities that detained individuals pursuant to the detainer to liability for violating individual constitutional rights.260 Once exposed, obedience to the detainer fell like dominoes in locality after locality.261 Jurisdictions across the nation issued policies prohibiting law enforcement officers from agreeing to civil immigration detention requests from ICE.262 The mandatory detainer rule was on the ropes.

Later that year, the mandatory detainer rule suffered a seemingly fatal blow from on high. In a November 2014 memorandum, DHS Secretary Jeh Johnson discontinued the Secure Communities program, replacing it with a program that set priority levels for immigration enforcement.263 The same memo made clear that an immigration detainer was a “request” to state and local officials rather than a mandatory obligation and that it was to be used rarely, if at all.264 From one day to the next, the liminal do-not-release rule that had been the key to Secure Communities’ high deportation levels seemed to evaporate.

The stickiness of the mandatory detainer rule played out both geographically and politically. Despite the rule’s constitutionally shaky

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259. Id. at *8.
260. Id.
261. See Lasch et al., Understanding “Sanctuary Cities,” supra note 127, at 1752 (citing Galarza v. Szalczyk, 745 F.3d 634, 645 (3d Cir. 2014)).
262. Id. at 1752; Lai & Lasch, Crimmigration Resistance, supra note 127, at 602–08 (observing that some jurisdictions embraced the “sanctuary” label as they “sought to celebrate diversity and renew commitments to nondiscrimination”).
263. November 2014 Secure Communities Memo, supra note 129, at 1–2 (“directing . . . ICE . . . to discontinue Secure Communities” and replace requests to detain individuals with requests for notification to ICE of a person’s release from nonfederal custody except in special circumstances).
264. Id.
foundation, the threat of municipal liability, and the diversion of state and local resources for administrative immigration purposes, many localities clung to the detainer. Criminal law enforcement jurisdictions in the Midwest and South continued to treat it as a requirement. In North Carolina, South Carolina, and Georgia, the number of detainers issued multiplied in the years following the \textit{Miranda-Olivares} decision. More than half of detainers issued in those states resulted in federal immigration detention for the individual in state or local custody. Within some states, jurisdictions split, with some declaring themselves detainer-free as others committed to obeying them. In Texas, Austin’s declaration that it would reject ICE detainers was met with state legislation requiring all Texas jurisdictions to obey detainers.

The Trump Administration sought to resurrect the nationwide reach of the mandatory detainer rule. It revived the Secure Communities program and stepped up the issuance of detainers across the nation. It threatened non-detainer jurisdictions with denial of federal funding for law enforcement. It entered into section 287(g) agreements with an increased number of law enforcement agencies, deputizing police and sheriffs as immigration agents and enabling the expansion of detainer use in those jurisdictions. One federal

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266. \textit{Sreenivasan et al.}, supra note 204, at 4 ("Between . . . 2016 and . . . 2018, the number of detainers issued by ICE doubled in North Carolina, nearly tripled in South Carolina, and nearly quadrupled in Georgia.").


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appellate court affirmed the mandatory nature of the detainer if a state or locality explicitly recreated the mandate through legislation.\textsuperscript{272} The nation divided between those jurisdictions that embraced detainer requests and those that refused them.\textsuperscript{273} Together, these developments resurrected the detainer in parts of the United States where they were functionally treated as mandatory.

3. The Stickiness of Administrative Closure

The stickiness of administrative closure belies its precarity. Immediately after its establishment as a docket management tool for the immigration courts, BIA precedent gutted it, handing to the immigration prosecutor a veto over case closures.\textsuperscript{274} After the revival of administrative closure in \textit{Matter of Avetisyan}\textsuperscript{275} and \textit{W-Y-U-}\textsuperscript{276} and robust application in the years following, \textit{Matter of Castro-Tum} again deflated administrative closure by declaring that Congress had not authorized it.\textsuperscript{277} In combination with the Trump Administration’s removal of DHS’s prosecutorial priorities, \textit{Castro-Tum} brought administrative closure to a halt.\textsuperscript{278} Its precariousness, in sum, lay in its vulnerability to change in agency policy.

Like DACA and the detainer, administrative closure resurrected itself, now for the second time and with an explicit recognition of its stickiness. In 2021, when \textit{Matter of Cruz-Valdez} revived administrative closure, the case laid out the decades-long history of judicial use of the tool. It relied explicitly on that “long-standing practice” to overturn \textit{Castro-Tum}. \textit{Cruz-Valdez} set the clock

\textsuperscript{272} City of El Cenizo, 890 F.3d at 191 (upholding a Texas law requiring municipalities to accede to detainers and holding that “Texas can ‘commandeer’ its municipalities in this way”).

\textsuperscript{273} See Lasch et al., \textit{Understanding “Sanctuary Cities,”} supra note 127, at 1736–52 (describing five principal legal and policy initiatives adopted by sanctuary jurisdictions in response to the Trump Administration’s “deportation apparatus”). The presence of detainer agreements was associated with other regional immigration restrictive practices, including slower adjudication times for naturalization applications at USCIS offices located in jurisdictions with 287(g) detainer agreements. Emily Ryo & Reed Humphrey, \textit{Citizenship Disparities,} 107 MINN. L. REV. 1, 40–43 (2022).


\textsuperscript{278} See supra Section I.B.3.
back to 2012, when prior BIA cases had recognized the judicial power to close and re-calendar cases in order to provide a pause in removal proceedings.\footnote{See Matter of Cruz-Valdez, 28 I. & N. Dec. at 328–29; supra Section I.B.3.}

\section*{C. Liminal Law is in Transition}

Liminal rules are often in transition, moving either toward formalization or toward extinction. This movement results from the tension between their three characteristics, which exerts pressure in both directions. Their robustness—that is, their potency as compared to traditional legal rules—in combination with their stickiness, pulls them toward formalization as statutes or regulations. Their fragility, especially their origins in the crucible caused by the ossification of traditional law, renders them vulnerable to toppling.

\subsection*{1. DACA in Transition}

DACA is either a step toward legislation creating lawful status for certain immigrant youth or a step away from it. DACA followed the near-passage of the DREAM Act, which would have carved out a traditional statutory path to lawful status for certain noncitizens who arrived in the United States as children.\footnote{See Development, Relief, and Education for Alien Minors ("DREAM") Act of 2010, S. 3827, 111th Cong. § 3 (2010); supra note 100.} After the DREAM Act lost by the narrowest of votes in 2010,\footnote{See ANDORRA BRUNO, CONG. RSCH. SERV., RL33863, UNAUTHORIZED ALIEN STUDENTS: ISSUES AND "DREAM ACT" LEGISLATION 17 (2012).} DACA stepped in to protect the same group but with more precarious legal protection.\footnote{See supra note 100.} By 2017, DACA had swung toward extinction as a result of the Trump Administration’s attempt to rescind it.\footnote{See supra notes 233–44 and accompanying text.} By 2022, DACA had pendulated from the solidity of a presidentially sanctioned administrative protection to the cliff’s edge of judicial invalidity, to the formal stability of rulemaking, to the precariousness of review by courts that had invalidated it.\footnote{See supra Section II.B.1.} DACA, therefore, was a liminal rule in transition either toward codifying the status of DACA recipients or away, toward its own destruction.\footnote{See generally American Dream and Promise Act of 2021, H.R. 6, 117th Cong. (2021) (proposing additional protections for youth in precarious immigration status); Dream Act of 2021, S. 264, 117th Cong. (2021) (proposing additional protections for youth in precarious immigration status); U.S. Citizenship Act of 2021, H.R. 1177, 117th Cong. (2021) (proposing a path to earned citizenship); U.S. Citizenship Act of 2021, S. 348, 117th Cong. (2021) (proposing a path to earned citizenship); see also AM. IMMIGR. COUNCIL, THE DREAM ACT: AN OVERVIEW 1 (2021), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_dream_act_an_overview.pdf [https://perma.cc/FK2R-892A] (providing an analysis of the various Dream Acts).}
2. Detainers in Transition

The immigration detainer is a liminal law in transition on multiple levels. Its central role in the Secure Communities program had endowed it with legitimacy and ubiquity. A legal challenge based in traditional principles of constitutional law and the potential for massive municipal liability nudged it toward extinction. The DHS memo that dismantled Secure Communities seemed to complete the transition from national ubiquity to near disuse. Yet state and local practices and legislation that embraced the detainer impelled it in the other direction. The Trump Administration’s attempt to revive the national use of the detainer sought to embed the detainer in formal law as elements of section 287(g) agreements and as a criterion for federal funding for law enforcement agencies. The detainer’s do-not-release rule has remained in transition, battered but retaining its shape as a mandate to detain.

The second level on which the detainer is in transition is from the federal level to the state level. The demise of the Secure Communities program did not end detainer use. Rather, the detainer’s claim of legitimacy shifted from the federal to the state level in jurisdictions where states and localities authorized its use. Texas’s detainer law, for example, resurrected the mandatory do-not-release rule as a matter of state law, requiring localities to obey detainers.286 A contrasting example is Washington state, which implemented sanctuary laws in 2019 and 2020 that prohibited local jurisdictions from acceding to detainers.287 Even so, several jurisdictions across Washington continued to respond to detainers or crafted local policies to avoid the new law.288

3. Administrative Closure in Transition

Administrative closure is a final example of a liminal rule in transition from liminality to formal law. After Castro-Tum’s deflation of immigration judges’ authority to administratively close cases, DHS finalized a regulation to

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286. Senate Bill 4, TEX. GOV’T CODE ANN. § 752.053, invalidated on other grounds by City of El Cenizo v. Texas, 890 F.3d 164 (5th Cir. 2018) (upholding provisions that required municipalities to accede to detainers).


288. See Protecting Immigrant Rights: Is Washington’s Law Working?, supra note 287. In Okanogan County, Washington, “officials developed . . . new . . . requirements to justify holding inmates [for forty-eight] hours beyond their release date” to line up with detainer practice. Id. In other counties, detainers were not officially honored, but a review of the communications between jail officials and federal agents suggested that local officials were unofficially obeying detainers. Id. Clark County jail officials did not prolong custody, but routinely notified ICE of inmate releases. Id.
essentially codify that limitation. The regulation would have completed the transition from a liminal rule to no rule at all if a district court had not enjoined the regulation and resurrected the status quo. The rule reversed direction toward codifying administrative closure when the Biden Administration began work on a revised regulation that Cruz-Valdez hinted would restore administrative closure. These undulations reflect not just the stickiness of the rule but its pendulum swing from near-extinction to the traditional garb of a regulation.

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The transitional quality of these rules illustrates the precarity of liminal legal rules. Without the barriers to change that characterize traditional legal rules, liminal rules remain in an in-between state, without the durability of statutes, regulations, and judicial precedent. Yet, despite this apparent precarity, liminal law is sticky. It resists its own demise. This peculiar combination of apparent precarity and stickiness results in liminal rules that have outsized impact yet exist in a state of flux.

While this Article relies on three case studies to derive the characteristics and scope of liminal law, liminal rules seem to be legion in immigration law and may populate other areas of law, as well. Immigration parole, which permits an inadmissible noncitizen to be physically present in the United States but does not provide lawful status, has liminal characteristics. It originated in limited form as an administrative construct, without a statutory basis. Parole's origin illustrates both its distance from traditional “hard” law and its precariousness. Parole then expanded to situations in which a noncitizen had an opportunity to adjust their immigration status to that of a lawful permanent resident, testify in a federal criminal trial, join the military, or naturalize as a U.S. citizen. In 1952, it transitioned from its liminal state to a statutory form when Congress passed the INA.
Liminal law is not always purely administrative, as the immigration detainer illustrates. An example of judicially-created liminal immigration law is the rule softening the immigration consequences of a criminal conviction. This rule began traditionally, as a power that Congress conferred on criminal sentencing judges to make a “judicial recommendation against deportation” ("JRAD") when sentencing a noncitizen for a crime.\(^{296}\) Such recommendations were uniformly followed.\(^{297}\) Congress repealed the JRAD in 1990,\(^{298}\) but it reappeared in a much softer form as a liminal rule. Criminal courts across the country adopted rules requiring judges and defense counsel to advise noncitizen defendants considering a plea deal when that plea may have immigration consequences.\(^{299}\) This liminal rule, requiring the criminal justice system to moderate the fairness of crime-based deportation, transitioned to traditional law when the Supreme Court established that the Fifth Amendment required counsel to adequately advise of immigration consequences and suggested that creative negotiation may result in avoidance of deportation.\(^{300}\)

### III. UNDERSTANDING LIMINAL IMMIGRATION LAW

This Part looks under the hood of liminal rules. It assesses what kind of “law” liminal rules are within the lexicon of law. It theorizes how liminal law acquired its telltale characteristics, especially its stickiness. This Part then assesses why liminal law exists—providing flexibility, a contested legitimacy, and a measure of stability to an ossified area of law. Finally, we address who liminal law impacts, exploring the racialization of law itself.

#### A. WHAT: HARD LAW, SOFT LAW, AND STICKY RULES

Liminal law unsettles our understandings about what “law” is. Liminal law creates powerful law-like rules when traditional law is stymied. It can establish a protective bubble for noncitizens, as DACA and administrative closure have done, or girder a national mass deportation program, as the mandatory detainer did for Secure Communities.\(^{301}\) Yet liminal law is not manifestly “law.” This Section explores where liminal rules fall in the legal lexicon: whether they

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297. Id. at 362.
299. See id. at 374 n.15 (noting that “many States require trial courts to advise defendants of possible immigration consequences” and citing relevant state statutes); id. at 367–68 (“The weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation.”).
300. Id. at 364, 373–74 (citing Jenny Roberts, Ignorance is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process, 95 IOWA L. REV. 119, 130 (2009) (concluding that under the Sixth Amendment, defense counsel has “a duty to warn defendants about consequences such as mandatory deportation”).
301. See supra Section I.B.2 and Part III (describing the impact of DACA and Secure Communities).
constitute positive “hard” law, soft law, or are instead law-adjacent, like social norms or discrete exercises of discretion.

Law can be seen as a spectrum, with “hard” or positivist conceptualizations of law at one end, “soft law” in the middle, and social customs on the other end. Liminal law is less formal and more opaque than traditional “hard” or positivist forms of law but more robust than social norms. It straddles the points on the spectrum between hard and soft law.

“Hard” or positive law consists of traditional governmental rulemaking procedures and outcomes. Positivist concepts of law have tended to examine whether a rule represents a sovereign command backed by the threat of some sanction or whether it comports with a “rule of recognition” of a legal system that would compel officials and individuals to defer to it. Statutes, regulations and precedent best exemplify positive law because of their binding nature and the clarity of their relationship with a lawmaking authority. Positivists distinguish these accounts of “hard” law from customs or social mores that arise from broad acceptance and practice by most members of the community but do not constitute “law.”
Liminal immigration rules function similarly to positive law, and they share a capacity for widespread impact. It is the similarity to positive law that makes liminal rules potent, leading law enforcement agencies to proceed as if the detainer were mandatory and sowing the impression that DACA originated from a presidential executive order. Like positive law, liminal immigration rules originate from a sovereign, often in the form of an administrative agency such as DHS, as the examples of the mandatory detainer rule and DACA illustrate. Still, liminal legal rules trouble the borders of positive law. The controversy over DACA has tended to be framed as a question of its validity as law, as an overreach of executive power. These arguments essentially assert a failure to comply with the formalities necessary for recognition as law.

Moreover, there is no formal sanction resulting from failure to obey the liminal command. An officer’s failure to heed a detainer results in no sanction on the individual level (though powerful social norms may place pressure on sheriffs and police officers to comply). A USCIS official’s erroneous DACA denial does not lead to a formal sanction for the official and there is no internal or external appeal, other than filing a new DACA petition. If the “sanction” is the “key to the science of jurisprudence,” as John Austin claimed, then liminal rules fail this aspect of positive law.

Yet liminal immigration law is quite distinct from the customs or social mores that populate the other end of the legal spectrum. Instead, liminal law shares much with soft law—sub-regulatory administrative rules that are

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310. See supra Section II.A.1.
311. See COX & RODRÍGUEZ, supra note 176, at 178–79.
312. See supra Section II.A.1.
313. See Gersen & Posner, supra note 305, at 579.
316. JOHN AUSTIN, LECTURES ON JURISPRUDENCE: THE PHILOSOPHY OF POSITIVE LAW 11 (Robert Campbell ed., 1875).
317. See HART, supra note 304, at 86–91; POSNER, supra note 304, at 8.
not formally binding but nevertheless manage the exercise of government authority. Soft law takes many forms: agency manuals, memoranda, protocols, guidelines, correspondence, and employee handbooks and training materials, among others.

In this sense, DACA, the detainer, administrative closure, and similar liminal rules exhibit attributes of “soft law.” DACA’s origin as a speech and an agency memo square with soft law in that DACA is framed as an exercise of discretion and not as a binding regulation. The origin of the detainer’s mandatory nature was not the statute or regulation governing detainers but the practices of law enforcement and immigration officials and the language of the form. Administrative closure as a form of relief from removal arose from an agency memo and administrative precedent that channeled agency discretion.

Liminal law, though, is a harder form of soft law. The stickiness of liminal law extracts it from the mainstream of soft law. Soft law can be powerful and influential, but it is vulnerable to revision or elimination due to a change in policy or administration. In fact, that flexibility is one of its advantages. The stickiness of liminal immigration law, coupled with its robustness, gives it a harder edge and the greater stability it shares with positive law, as further described below.

In sum, liminal law stands with one foot in hard law and the other on the firmer edge of soft law. This state of being between positive law and soft law leaves these rules in a liminal space, occupying the threshold


319. See Sossin & Smith, supra note 318, at 871.

320. See Rubenstein, supra note 318, at 195 n.469 (“DACA and DAPA would fall into the category of soft law because they were formed outside of notice-and-comment rulemaking procedures, and they ostensibly do not create rights or duties.”); Alexander Betts, Soft Law and the Protection of Vulnerable Migrants, 24 GEO. IMMIGR. L.J. 533, 536 (2010) (arguing “for the development of a soft law framework [for] the protection of vulnerable [undocumented] migrants”).


322. See infra Section III.B (describing the elements of the detainer as a liminal law and the role of the form).

323. See supra notes 145–49 and accompanying text.

324. See Rubenstein, supra note 318, at 195 n.469; Sossin & Smith, supra note 318, at 871.

325. See infra Section III.B.
between a traditional legal rule and the practice, policy, or a discretionary call of soft law.  

B. HOW: STICKINESS, PATH-DEPENDENCE, AND THE POWER OF THE FORM

1. Stickiness and the Role of Path-Dependence

At least as important as classifying liminal rules is understanding why they stick around even in the face of determined efforts to eradicate them. What explains the stickiness of liminal law? And why do some rules achieve stickiness when others do not? We offer intertwined explanations: Liminal immigration laws exhibit path-dependency, facilitated by the stickiness inherent in the process and staying power of the government form.  

Liminal rules, once firmly rooted, achieve path-dependence. As Oona Hathaway has described, “‘path dependence’ means that an outcome or decision is shaped in specific and systematic ways by the historical path leading to it.”  

Once a course of action has started down a track, the costs of reversal increase. Even when other choice points arise, “the entrenchments of certain institutional arrangements obstruct an easy reversal of the initial choice.”  

As an examination of the case studies shows, liminal legal rules exhibit this resistance to reversal as a result of the social norms that grow up around liminal legal structures, the gravity and momentum that they acquire through

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326. Ronald Dworkin’s critique of legal positivism urged us to move past the idea that rules of law are validly recognized as “law . . . because some competent institution enacted them.” Dworkin, supra note 307, at 41. Some legal principles, he argued, originate “not in a . . . legislature or court, but [rather] in a sense of appropriateness developed in the profession and the public over time.” Id.


usage over time, and the deepening reliance on them by individuals and institutions.330

The survival of the original grant of DACA resulted from path-dependence. The creation in the DREAM Act of a category of people defined by youth, length of residence in the United States, and lawful conduct led to the appearance of a very similar category in DHS's Morton memo deprioritizing deportation of that group, followed by the reappearance of similar criteria in the Napolitano memo establishing DACA and crystallizing the do-not-deport rule.331 The creation of a system and a form to process DACA applications solidified the path.332 That path led to a growing population of DACA recipients with access to work authorization, then to an expanding number of employers reliant on DACA holders with work authorization, and to public recognition of DACA holders as a group.333 People with DACA held jobs, went to school, and frequented banks and other institutions.334 In many cases, their communities formally recognized their membership through legal rules like state laws and local ordinances.335

DACA illustrates that once a liminal rule takes hold, institutions, individuals, employers, and social networks shift their practices. Patterns of behavior and interactions take root between these institutions, employers, and social networks based on the liminal rule. The passage of time and the accumulation of decisions made DACA’s liminal rule hard to reverse or modify.336 This accumulation of actions, decisions, transactions, and interactions established the long path through which DACA had traveled by the time a new presidential administration attempted to terminate it. That pathway mattered when officials sought to rescind DACA.337 Undoing DACA meant more than just re-imposing the immediate threat of deportation that DACA recipients had been subject to. It meant removing employees from employers, invalidating driver’s licenses and identification cards, destabilizing bank

331. See supra Section I.B.1.
332. See supra Section I.B.1.
333. Burciaga & Malone, supra note 8, at 1096 (collecting studies and positing that “research has shown significant economic and social gains for eligible undocumented young adults” since DACA’s introduction in 2012).
334. Id. at 1104–07 (reporting the results of a study of the educational, economic, and emotional gains respondents made because of the DACA program and the impacts of its rescission, pointing to educational achievements, financial stability, and employment).
335. See id. at 1096.
336. See Texas v. United States, 59 F.4th 498, 531 (5th Cir. 2022) (staying the vacatur of DACA as to current recipients due to its "profound significance to recipients and many others in the ten years since its adoption").
337. See supra Section II.B.1 (detailing attempts to rescind DACA); see also René Galindo, The Functions of Dreamer Civil Disobedience, 24 TEX. HISP. J.L. & POL’Y 41, 41–43 (2017) (describing Dreamers’ engagement in civil disobedience).
accounts, and undermining state and local laws and ordinances.\textsuperscript{338} It required stripping away the acquired legitimacy of a highly visible, sympathetic group of noncitizens.\textsuperscript{339}

DAPA stands as an important counterpoint to the stickiness of DACA. In contrast to DACA, DAPA’s do-not-deport rule for the parents of U.S. citizens and lawful permanent residents never acquired the path-dependence that would have resisted its downfall. Despite the possibility that DAPA would have manifested the characteristics of a liminal rule, DAPA was arrested before it could start down the path to robustness as a liminal rule.\textsuperscript{340}

The mandatory nature of the detainer’s do-not-release rule illustrates a similar path-dependence. The do-not-release rule came into being through the accretion of scores of state and local law enforcement officials heeding scores of requests by ICE officials using a form that simulated a criminal warrant. At some point along this path, it achieved the acceptance and practice

\textsuperscript{338} See Burciaga & Malone, supra note 8, at 1104–07; see also DHS v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1913–14 (2020) (discussing the Duke Memorandum’s failure to consider reliance interests in DACA (citing Duke Memo, supra note 108)).

\textsuperscript{339} Rescinding DACA may also have triggered a psychological heuristic called loss aversion bias that biases individuals against accepting decisions when they are presented as taking away a possession or a privilege. See Donald C. Langevoort, Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review, 51 Vand. L. Rev. 1499, 1503–04 (1998). Our assessments of the fairness of an action depends in part on whether we perceive the action as declining to provide something to someone versus taking away something they appear to possess. See id. (discussing decision-making biases in law including loss aversion bias and noting the common “tendency . . . to weigh losses more heavily than gains”); Roger G. Noll & James E. Krier, Some Implications of Cognitive Psychology for Risk Regulation, 19 J. Legal Stud. 747, 752 (1990) (“Loss aversion refers to the fact that people ascribe additional negative value to an outcome if it represents a negative change from the status quo.” (emphasis omitted)); Eyal Zamir, Loss Aversion and the Law, 65 Vand. L. Rev. 829, 866 (2012) (applying loss aversion bias to international refugee law and observing that depriving someone of a benefit they already have, such as removing a noncitizen from a country, is more likely to be perceived as a loss than denying someone a benefit they do not have, such as denial of a visa); see also Varol, Constitutional Stickiness, supra note 234, at 904–05 (applying loss aversion bias to path-dependence in the context of constitutional stickiness). If DACA is perceived as belonging to the recipient or as a benefit to the community or the nation, rather than conferring a new privilege, loss aversion bias may trigger the perception that rescission is unfair. See Zamir, supra at 866.

\textsuperscript{340} The do-not-deport rule for parents of U.S. citizens and lawful permanent resident children exists in some forms outside of DAPA. Cancellation of removal for nonpermanent residents applies to parents whose removal would result in exceptional and extremely unusual hardship to a U.S. citizen or to lawful permanent resident family members—a high standard. See Immigration and Nationality Act § 240A(b) (as amended 2022); 8 U.S.C. § 1229b(b). The rule finds purchase in other administrative actions too. In 2021, the Biden Administration issued a memo declaring that cases of immediate relatives of military members and individuals with serious physical or mental illnesses “generally will merit dismissal in the absence of serious aggravating factors.” Memorandum from John D. Trasviña, Principal Legal Advisor, U.S. Immigr. & Customs Enf’t, to All OPLA Att’ys 9–10 (May 27, 2021), https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_interim-guidance.pdf [https://perma.cc/3YMH-WFLB]. While these differ substantially from deferred action under DAPA, they illustrate that DAPA’s rule protecting certain parents from removal can manifest in liminal ways in other contexts.
of a customary norm within the community of law enforcement officials. \textsuperscript{341}

Once Secure Communities rolled out across the country, ad hoc practices of issuing individual detainers evolved quickly into systematized application of the mandatory detainer rule. \textsuperscript{342}

That initial move set the mandatory detainer rule on a path down which it continued despite constitutional obstacles and substantial community pressure to resist it. As the use of detainers spread, the practice solidified relationships between police and ICE in jurisdictions in every state. \textsuperscript{343} Habits and practices of joint enforcement rose up around detainer use. \textsuperscript{344} Police work was re-envisioned as immigration enforcement work, fashioning a hybrid world in which administrative immigration enforcement melded into crimmigration law enforcement. \textsuperscript{345} Those relationships, habits, and practices wore a path that survived the formal termination of the Secure Communities program and resisted the “sanctuary” policies of state and local jurisdictions. \textsuperscript{346} Even as case law holding that the mandatory detainer rule was inconsistent with the Tenth and Fourth Amendments accumulated, \textsuperscript{347} many jurisdictions continued to heed the detainers and some passed laws requiring or permitting local law enforcement to respond to them. \textsuperscript{348} Again, like DACA, the passage of time and the accretion of relationships, practices, habits, and the multiple variations of the detainer form moved the detainer rule further down a path that resisted alteration.

Administrative closure similarly achieved stickiness through path dependence. It transitioned beyond mere recognition of its existence and examples of its application to acquiring the contours and criteria through precedent and practice that gave it the character of a functional rule. Over time, a process for seeking administrative closure grew up around the rule:

\textsuperscript{341} See supra Section II.A.2 (describing some origins of the mandatory detainer rule).

\textsuperscript{342} See Lasch, Rendition Resistance, supra note 9, at 154–65 (describing the rise and fall of Secure Communities); see also 8 U.S.C. § 1254a(b)(1)(A)–(C) (describing when the Attorney General does not return individuals).

\textsuperscript{343} See supra notes 213–14 and accompanying text (describing increasingly intertwined roles of federal immigration agents and state and local police).


\textsuperscript{345} See supra notes 203, 206–07 and accompanying text.

\textsuperscript{346} For a similar analysis relating to immigrant detention, see Alexandra Olsen, Note, Over-Detention: Asylum-Seekers, International Law, and Path Dependency, 38 BROOK. J. INT’L L. 451, 479 (2012) (“[T]he presumption in favor of detention might now be locked-in because it is easier to continue using it than to alter infrastructure and training to facilitate eliminating it.”)

\textsuperscript{347} See Mayorkas Prosecutorial Discretion Memo, supra note 128, at 2–4 (tracing challenges to the mandatory detainer).

\textsuperscript{348} See City of El Cenizo v. Texas, 890 F.3d 164, 183–90 (5th Cir. 2018) (describing trend toward local continuance of detainers, including Texas Senate Bill 4).
practice advisories for motions to seek closure, a template for ICE to make a joint motion for closure, and the weight and momentum of long use.\textsuperscript{349} Together, these set administrative closure on the path to liminality.

2. Stickiness and the Power of the Form

Government forms are a main ingredient in the stickiness of liminal legal rules. In the absence of a statute or regulation, immigration practitioners and officials use a form to carry out the work that a statute or regulation would do. With both DACA and the detainer, the power of the humble government form determined which agency mission would be primary.\textsuperscript{350} It also settled which immigration orientation was at play—integration versus enforcement or regulatory versus crimmigration.

For DACA, the form served two functions: Its criteria set apart a group of people who the law otherwise treated as indistinguishable from other deportable noncitizens.\textsuperscript{351} DACA then reclassified that group as non-deportable.\textsuperscript{352} Thus far, this was nothing new. The predecessor to DACA—the DHS memos setting priorities for deportation—had defined this same group and similarly sought to protect them from deportation.\textsuperscript{353} The memos failed to prevent immigration arrests of group members, perhaps because the memos were in tension with the agency’s perceived mission of maximizing removal of deportable noncitizens.\textsuperscript{354}

What was new was shifting the responsibility for protecting that group from the deportation agencies within DHS to the benefits-granting authority of USCIS. DACA created a process for obtaining a liminal status and embodied that process in the language that benefits-granting administrative agencies speak: an application form.\textsuperscript{355} Processing benefit forms is the bread and butter

\textsuperscript{349}. See supra note 135 and accompanying text; Rabin, supra note 15, at 582 (reporting that administrative closure was widely used during the Obama Administration, increasing by 18,000 from 2013 to 2016).

\textsuperscript{350}. Because administrative closure occurs in the course of agency adjudication, it has no official government form.

\textsuperscript{351}. See supra Section I.B.1 (describing the impact of DACA on deportable noncitizens).

\textsuperscript{352}. See supra Section I.B.1 and accompanying text; see also Texas v. United States, 50 F.4th 498, 508–09 (5th Cir. 2022) (concluding that more than one million people fell under DACA’s protection).

\textsuperscript{353}. See DACA Memo, supra note 100, at 2–3.


\textsuperscript{355}. See supra notes 179–80 and accompanying text (describing the form used to confer DACA status).
of USCIS’s day-to-day work. Unlike directing ICE agents not to act, the USCIS DACA form was completely consistent with USCIS’s typical operations. The form translated the memorialized statements of the DHS Secretary and President into something practitioners could use to shift their clients to a more protected legal space.

Like DACA’s application form, the immigration detainer form was central to the construction of the mandatory do-not-release rule. This process—an immigration agent’s selecting of an individual noncitizen, completing a form marking out reasons for retaining custody, transmitting the form to the state or local criminal law enforcement agency, and the local agency’s compliance via continuation of custody—repeated infinitely nationwide. It established a pattern of compliance with the detainer form. It cemented a habit of obedience by nonfederal criminal law enforcement agencies to a federal administrative agency.

The detainer form, Form I-247, made the mandate to detain tangible for police and jailers. Receiving an official form from a fellow law enforcement officer seemed to transmit that ICE agent’s authority to maintain custody for immigration purposes to the state or local official. This penumbra of federal immigration authority seemed to exempt local police from the Fourth Amendment requirements for probable cause of a crime or judicial review before issuance.

3. Stickiness in Theory and Operation

Several theories illuminate how stickiness operates to enable liminal law. Liminal law illustrates what David Schraub has described as a sticky slope. A sticky slope arises when victory at one stage of pursuing a social or policy change leads to resistance that slows later movement toward the goal. For those pushing for more restrictive immigration policy, the defeat of the DREAM Act was a victory, but one that led the newly defined group of resident

356. See U.S. CITIZENSHIP & IMMIGR. SERVS., ALL FORMS, https://www.uscis.gov/forms/all-forms (linking to online forms); see also COX & RODRÍGUEZ, supra note 176, at 177–80 (describing the role of USCIS in implementing DACA).

357. See COX & RODRÍGUEZ, supra note 176, at 177–80.


359. Id.; see Lasch, Rendition Resistance, supra note 9, at 209 (confirming that forms issued for detainers after 2011 compelled local law enforcement to detain noncitizens).

360. See Lasch, Rendition Resistance, supra note 9, at 222–23 (concluding that ICE does not hold itself to Fourth Amendment probable cause and notice requirements).

361. See David Schraub, Sticky Slopes, 101 CALIF. L. REV. 1249, 1256 (2013) ("A sticky slope exists whenever, in the course of pursuing an array of goals, the achievement of one victory makes it more difficult for the movement to attain others—where a victory at one stage helps presage a defeat at another.").

362. Id. at 1256.
immigrant youth to press the executive branch for an administrative solution. That became DACA’s do-not-deport liminal rule.363

Similarly, the judicial blow that the Miranda-Olivares case struck against the mandatory detainer, which was the result of years of immigrant advocacy, inspired the rise of sanctuary jurisdictions that rejected detainers. Those jurisdictions ultimately became the target of the Trump Administration’s attempt to resurrect the mandatory detainer rule.364 With administrative closure, the Trump Administration’s act of stripping from the immigration courts the long-held power to put cases on hold led not only to a reversal of that decision and a revival of the immigration courts’ administrative closure discretion but also triggered a rulemaking to codify the closure power.365

The sticky slope phenomenon pairs with an “endowment effect” that furthers the development of liminal rules. David DePianto theorizes that the stickiness of a legal rule results in large part from benefits that accrue over time from complying with the rule.366 These benefits gain value to the holder once they have “complied with a law, received some associated benefits, and grown attached to such benefits.”367 This “endowment effect” means that the complier values the benefits of complying with the rule, leading to path-dependence and further compliance.368

The endowment effect was central to the defense of DACA in Texas v. United States. The federal government argued that complying with DACA had led to benefits to the DACA recipients but also to family and associates, employers, states, and the national economy which, according to amici, could drop by as much as $460 billion without DACA.369 In determining that DACA was a substantive rule for purposes of the APA, the Fifth Circuit concluded that “DACA is of enormous political and economic significance to supporters and opponents alike.”370 The court’s decision to leave DACA in place pending Supreme Court review rested on these accrued benefits, pointing to findings that “[h]undreds of thousands of individual DACA recipients, along with their employers, states, and loved ones, have come to rely on the DACA program.”371

363. See supra notes 94–102 and accompanying text.
364. See Kahan, supra note 233, at 607–09 (arguing that lawmakers should apply “gentle nudges” rather than “hard shoves” when legislating in order to avoid law enforcement resisting the changes due to sticky societal norms because the resistance reinforces the societal norms lawmakers are trying to change).
365. See NEAL, supra note 163, at 4 & n.4 (issuing interim policy “pending the promulgation of a regulation addressing administrative closure”).
367. Id. at 330.
368. See id. at 356–58.
370. Id. at 527.
371. Id. at 530 (alteration in original) (citation omitted).
Why does liminal law exist? This Section posits that liminal immigration fulfills three functions. It adds flexibility when a legal field ossifies, bolsters the legitimacy of a course of action, and creates stability for those whom the liminal rule governs.

1. Flexibility

Liminal law provides some flex in the joints of a calcified area of law. Immigration law is simultaneously hard to change and under tremendous strain due to its prominence on the political stage, its centrality to the economy, and the racialization of immigration enforcement.\(^{372}\) When the traditional means of revising immigration law encounter insurmountable obstacles that block iterative policy change, liminal law provides flexibility which can relieve the pressure for change.\(^{373}\) This flexibility flows from the fact that liminal law is easier to create and modify than traditional law, with its procedural hurdles to revision and retraction.\(^{374}\) Procedural requirements, such as notice and comment, precede amendment or repeal of regulations,\(^{375}\) and stare decisis and deference doctrines slow the development of case law.\(^{376}\) Liminal law arises outside of these well-marked pathways, facilitated by the notion that administrative actions flow to the path of least resistance. That is, if regulations in controversial areas are hard to promulgate or vulnerable to challenge, then agency actions will take an easier (though less durable) pathway,\(^ {377}\) in the form of policy memos, devolution of discretion, or administrative forms.\(^{378}\)

\(^{372}\) See supra Section I.A (discussing the ossification of formal immigration law).
\(^{374}\) See U.S. Const. art. I, § 7.
\(^{375}\) Administrative Procedure Act (APA), 5 U.S.C. § 553; see id. §§ 556–57.
\(^{377}\) Nicholas R. Parrillo, \textit{Should the Public Get to Participate Before Federal Agencies Issue Guidance? An Empirical Study}, 71 \textit{Admin. L. Rev.} 57, 60 (2019) (noting “that [agency] guidance can be produced and altered at greater speed, in higher volume, and with less accountability than legislative rules can” and that “[t]he justification for this procedural looseness is that guidance, unlike a legislative rule, is not supposed to be binding on the agency or the public”).
Liminal law thus has important implications for advocacy. Immigration advocacy can be both the parent and the offspring of liminal law. Pressure for legal innovation, for expanded pathways to lawful status for undocumented immigrants, or for expansion of enforcement methods may trigger a transformative moment in immigration law. As Jennifer Chacón points out, rights-protective advocacy tends to work against a backdrop of merely skeletal constitutional rights.\textsuperscript{379} Activism on behalf of noncitizens has had to innovate, perhaps by drawing in rights and principles from mainstream areas of law,\textsuperscript{380} or “engag[ing] in political acts that assert previously unacknowledged rights into existence.”\textsuperscript{381} After the DREAM Act failed, the activism of immigrant youth created public pressure to fashion a new solution, one that used an old tool—deferred action—to address a new situation.

But the flexibility that liminal rules provide is not confined to rights protection. The immigration detainer’s do-not-release rule arose under circumstances in which state involvement in immigration enforcement had little constitutional grounding.\textsuperscript{382} Yet the detainer’s mandatory do-not-release rule created a new way for ICE to seize noncitizens in criminal custody.\textsuperscript{383}

While flexibility may be important when traditional law ossifies, the flexibility of liminal law strikes an undemocratic note. Crafting law-like rules outside of the traditional lawmaking processes seems unpredictable and opaque. The very liminality of these rules makes them hard to recognize or challenge via judicial review or legislative command. To the extent that liminal rules rely on path-dependence, they become difficult to unravel. Liminal law may also ease pressure for needed legal reform that would otherwise come through traditional, more transparent processes like enacting legislation or promulgating regulations. If liminal law is easier to create and revise than the more traditional sleeves for legal rules, it raises the prospect of an administrative state governing largely through liminal law.

One response to this critique is that liminal rules are not true substitutes for traditional law. Liminal rules like DACA did not fully address the call that

\textsuperscript{379} Chacón, \textit{Producing Liminal Legality}, supra note 7, at 764.


\textsuperscript{381} Chacón, \textit{Producing Liminal Legality}, supra note 7, at 764–65.

\textsuperscript{382} See Fong Yue Ting v. United States, 149 U.S. 698, 712 (1893) (holding that the Constitution grants the federal government power to regulate issues involving foreign relations, including “naturalization” and immigration); Juliet P. Stumpf, \textit{States of Confusion: The Rise of State and Local Power Over Immigration}, 86 N.C. L. REV. 1557, 1600–08 (2008) [hereinafter Stumpf, \textit{States of Confusion}] (analyzing the tension between the “domestication of immigration law,” constitutional preemption, and equal protection).

\textsuperscript{383} See supra Section I.B.2 (describing development of ICE detainers).
immigrant youth made for stable, long-term status. Instead, it created a liminal status or a non-status. And the liminal rule itself was precarious, battered by executive and judicial attempts to terminate it. The mandatory detainer rule, lacking the anchor of a statute or regulation, similarly foundered in the face of administrative attempts to shut it down and a series of court challenges to its constitutionality and legitimacy. These disadvantages are not about the content of the rule. They are inherent in the liminal nature of liminal law.

2. Legitimacy

Liminal law can also imbue people, processes, and actions with legitimacy. The criteria for the detainer and for DACA accomplished something more than creating liminal rules. They created a foundation for legally recognizing the legitimacy of the individual or the agency’s immigration-related action. DACA has a collateral consequence that is law-like: It has power to shift perceptions about legitimacy. Legal rules have moral force. They can counteract perceptions that actions—or individuals—are illegitimate, such as when criminal laws are passed or repealed, or same-sex conduct declared lawful. DACA counteracts the illegitimacy of unlawful presence by shifting undocumented youth from a category in which their presence itself is labeled as illegitimate to a newly defined category with attributes that resemble lawful status. Together with the effect of integration into educational, economic, and social spheres, DACA holders as a group acquired substantial legitimacy in the public eye.

Similarly, the immigration detainer boosted the legitimacy of something that had been in question: the role of state and local law enforcement in

384. See Chacón, Producing Liminal Legality, supra note 7, at 725.
385. See Heeren, supra note 7, at 1181.
388. See Chacón, Producing Liminal Legality, supra note 7, at 719 (observing that DACA, and DREAMers’ own political agitation, allowed DREAMers to “move[] out of the shadows” and “demonstrate[] levels of belonging, political participation, and social influence that are often thought to be limited to formal legal citizens”); Heeren, supra note 7, at 1178 (noting that “[i]n status [could] . . . be a way station en route to status” for DREAMers).
389. See supra note 388. This legitimacy-enhancing aspect of DACA may have the undesired effect of deepening an artificial divide between the “good” and the “bad” immigrant. See Elizabeth Keyes, Beyond Saints and Sinners: Discretion and the Need for New Narratives in the U.S. Immigration System, 26 GEO. IMMIGR. L.J. 207, 221 (2012) (noting “an unintended cost to the advocacy that accompanies the ‘good immigrant’ laws like the DREAM Act or DACA, that ‘[b]y putting forward only blameless victims of others’ acts (parents who brought children across the border, abusers, foreign persecutors, traffickers), advocates inadvertently set an exceptionally high bar for who merits membership in American society”).
immigration law. Deportation and exclusion are administrative proceedings.\textsuperscript{390} Outside of immigration law, police involvement in administrative proceedings is exceptional.\textsuperscript{391} The detainer form, despite being issued by an administrative agency for civil detention, was clothed with authority. It bore the icon of a federal agency and a bolded imperative exhorting the police to detain a suspected lawbreaker. The form purported to imbue the receiving police officer or sheriff with that authority, creating the appearance of legitimacy for the mandate to shift individuals to administrative immigration custody. The widespread use of the mandatory detainer in the Secure Communities program legitimized the involvement of state and local law enforcement in the deportation process. In turn, the connection between police and immigration law aligned deportation more closely with criminal law enforcement.

3. Stability

Liminal rules can have a stabilizing influence on an area of law. Aaron Nielsen, responding to critique that administrative rulemaking should be streamlined, has countered that “sticky” regulations have a stabilizing effect on regulated entities.\textsuperscript{392} When “regulated parties know that an agency must survive a procedural gauntlet to change a regulatory scheme,” he says, “they can have more confidence in that scheme’s stability.”\textsuperscript{393}

This seems true of liminal immigration law, at least to some extent. DACA and administrative closure mitigated the threat of deportation for millions of noncitizens.\textsuperscript{394} Administrative closure permitted innumerable noncitizens to pursue more stable immigration status outside of the deportation process. With the threat of deportation at least temporarily at bay, these noncitizens could participate more openly in their communities.

These liminal states of being are by nature precarious.\textsuperscript{395} They nevertheless offered more stability for integration via work, education, and other activities than the extreme precarity of undocumented life. Because

\textsuperscript{390} See Wong Wing v. United States, 163 U.S. 228, 231 (1896) (establishing that deportation is not criminal); Stumpf, \textit{States of Confusion}, supra note 382, at 1574 (discussing the meaning of deportation and punishment depending on whether imposed in the “entry, exclusion, and deportation” context).

\textsuperscript{391} Exceptions include civil commitment and juvenile delinquency. See Jain, supra note 314, at 826–44 (identifying the impacts of data gathered during and after an arrest across a spectrum of noncriminal situations, including immigration); Mary Beth West, \textit{Note, Juvenile Court Jurisdiction Over “Immoral” Youth in California}, 24 STAN. L. REV. 568, 578–81 (1972) (discussing police involvement in juvenile criminal and noncriminal cases in California).

\textsuperscript{392} See Nielsen, supra note 234, at 87–90, 136–37 (summarizing commentary on the “ossification” of administrative rulemaking and the critique “that there are too many procedures and that administrative law should be transformed to speed up the regulatory process”).

\textsuperscript{393} Id. at 90.

\textsuperscript{394} See supra notes 330–35 and accompanying text (describing the impact of DACA on otherwise deportable noncitizens).

\textsuperscript{395} See Burciaga & Malone, supra note 8, at 1102 (“DACA was never a clean or complete break from the precarity of undocumented life.”).
DACA was a grant of deferred action, it conferred work authorization and with that a form of identification necessary for the everyday functions of modern U.S. living: access to banking, drivers licenses, loans, credit building, and the Social Security system, among many others. These collateral effects of deferred action made DACA recipients formally recognizable to institutions like banks, universities, employers, and state and local governments. It created stability not just for the DACA recipients but also for the individuals and institutions that dealt with and relied on them to work, study, and participate in the social and economic aspects of society.

Administrative closure fostered stability on several levels. Certainly for the individual benefiting from it, achieving the non-status of administrative closure allowed for continued integration into the community in way similar to that experienced by DACA holders. And like DACA, the stability that administrative closure provided adhered to the family members, employers, institutions, and other community members. On another level, administrative closure contributes to the stability and legitimacy of immigration law itself when used to provide time for adjudication of admission applications or relief. In that circumstance, closure avoids the inconsistency of an order to remove a noncitizen who is simultaneously eligible for lawful status.

The form and processes surrounding liminal laws were critical ingredients in creating this stability. Housing the decision to provide forbearance from deportation in the benefits-granting agency fit USCIS’s everyday work of creating stable immigration and citizenship status and benefits that underlie integration into society like work authorization and personal identification. The process and the form together shuttled immigrant youth from the bailiwick of an agency whose everyday work was to delegitimize and deport noncitizens—ICE and CBP—to the agency whose mission was to further individual and societal stability through admission and benefits.

396. Id. at 1100–01 (collecting research showing that in the first year of DACA’s “existence[,] . . . many DACA holders found new jobs, increased earnings, obtained driver’s licenses, and opened bank accounts”). See 8 C.F.R. § 274a.12(c) (2022) (conferring on deferred action recipients the right to apply for work authorization from USCIS).

397. See Chacón, Producing Liminal Legality, supra note 7, at 719; Heeren, supra note 7, at 1132–33 (observing that many recipients of liminal status like DACA described receiving that “nonstatus” as “coming out of the shadows”).

398. Chen, Administrator-in-Chief, supra note 321, at 385–86 (describing the DACA memo as “systematiz[ing] the process for considering deferrals by producing application forms and compliance manuals, and . . . creat[ing] service centers to process the applications”); Cox & Rodríguez, supra note 176, at 177–80 (contrasting USCIS employees, who have as a core part of their mission the facilitation of immigration, with ICE employees who are “steeped in the attendant professional culture focused on rooting out and deterring legal violations”).

399. Ming Chen points out that DACA and the detainer were part of the same administrative scheme to address unauthorized migration under the Obama Administration. See Chen, Administrator-in-Chief, supra note 321, at 381–84 (describing how “President Obama’s deferred action policies tackled the undocumented immigrant population from two sides”).
The mandatory detainer also created a form of stability in law enforcement relations, at least for a time. The widespread use of the detainer led to the normalization of police detention of noncitizens for administrative immigration violations.\footnote{Miranda-Olivares v. Clackamas Cnty., No. 12-cv-02317, 2014 WL 1414305, at *11 (D. Or. Apr. 11, 2014) (holding that “the Fourth Amendment apply[ed] to [the] County’s detention of Miranda-Olivares” and that the detention violated the Fourth Amendment); see also Lasch et al., Understanding “Sanctuary Cities,” supra note 127, at 1758–61 (describing three lines of case law to illustrate judicial concern over unlawful arrests); Lasch, Federal Immigration Detainers, supra note 114, at 666–68 (discussing the “far reaching” implications of the Supreme Court’s discussion of Fourth Amendment issues in Arizona v. United States).} It accustomed state and local law enforcement across the country to playing an adjunct role to immigration officials pursuing civil immigration violations such as unlawful presence.\footnote{See Lasch et al., Understanding “Sanctuary Cities,” supra note 127, at 1730–33.}

\section*{D. Who: Liminal Law for Liminal Classes}

Who benefits from or is targeted by liminal law? Liminal law raises the specter of segregating law in ways that have a racial impact. Immigration enforcement and admissions laws apply unevenly to different racial groups.\footnote{See Devon W. Carbado & Cheryl I. Harris, Undocumented Criminal Procedure, 58 UCLA L. REV. 1543, 1583–86 (2011) (discussing “pretext and . . . specific racial profiling” employed by police and immigration officials); Chacón, Producing Liminal Legality, supra note 7, at 749–52 (discussing how “individuals . . . are[] profiled based on ethnicity and national origin” in immigration enforcement); Lasch et al., Understanding “Sanctuary Cities,” supra note 127, at 1764–68 (discussing measures taken by some jurisdictions “to promote the equal protection of law” in light of the “heighten[ed] . . . risk of discriminatory policing” resulting from involving local police in immigration enforcement); Motomura, The President’s Dilemma, supra note 173, at 25–26 (discussing how ICE’s “case-by-case assessments” welcome the likelihood of bias); Carrie L. Rosenbaum, The Natural Persistence of Racial Disparities in Crime-Based Removals, 13 U. SAINT THOMAS L.J. 532, 546 (2017) (discussing DHS’s failure to address racial profiling in immigration enforcement); USCIS 2020 ENFORCEMENT AND REMOVAL REPORT, supra note 69, at 26–32 (showing rates of removals based on national origin from FY2018 to FY2020).}

DACA and the mandatory detainer rules exemplify this: DACA is disproportionately held by noncitizens of color, while a relatively smaller number of noncitizens of color immigrate through the admissions system.\footnote{Rosenbaum, supra note 402, at 563–64 (“[C]riminal immigration policing . . . has resulted in disproportionate criminalization and deportation of Latina/os and persons of color.”); see also U.S. CITIZENSHIP & IMMIGR. SERVS., APPROXIMATE ACTIVE DACA RECIPIENTS 1 (2017), https://www.uscis.gov/sites/default/files/document/data/daca_population_data.pdf [https://perma.cc/4JBD-PCBD] (showing that 79.4 percent of DACA recipients were born in Mexico).} Detainers hold undocumented noncitizens who are disproportionately of Latinx origin.\footnote{See Chacón, Producing Liminal Legality, supra note 7, at 749–52 (establishing a connection between liminal vulnerability and race markers); Yolanda Vázquez, Constructing Crimmigration: Latino Subordination in a “Post-Racial” World, 76 OHIO ST. L.J. 599 (2015), reprinted in 36 IMMIGR. & NAT’LY REV. 713, 716–18 (2015) (discussing “[d]isparities . . . between Latinos and other groups of the population in . . . detention and removal rates in the immigration system” (footnote omitted)).} Their use facilitated the singling out of a particular racial group—Latinx members—for law enforcement, resulting in ballooning arrest
and detention rates of Black and Latinx people.\textsuperscript{405} And the practice of complying with detainers led to racial profiling not only by law enforcement officers who were specifically authorized to obey detainers, but also by police and sheriffs in jurisdictions surrounding those officers.\textsuperscript{406} These facts suggest that liminal law segregates law itself in racial ways. The most desirable immigration rules that endow noncitizens with stable legal status are statutory. These include the admissions provisions for lawful permanent residence through employment and family ties. These stable, statutory categories disproportionately benefit those of European descent.\textsuperscript{407} Liminal laws such as DACA, the mandatory detainer rule, and administrative closure either provide only a half-step liminal status largely relegated to noncitizens of color or pave the way to expanding enforcement of immigration law by state and local criminal law enforcers. Combined with the disproportionate policing of communities of color in the United States that scholars and activists have brought to light, this racialized divide between protection from deportation and expanded immigration enforcement is especially fraught.\textsuperscript{408}

CONCLUSION

Liminal law is humble in form and powerful in practice. It constitutes a tremendously influential means of governance. Liminal rules may arise from the declaration of an official, like the DACA program, or the creation of a form, like the ICE detainer form delivered to state and local officials. Yet they exert a power similar to that of traditional legal rules. They may prevent an

\textsuperscript{405} See Vázquez, Perpetuating, supra note 69, at 666 (observing that most removals based on criminal convictions are Latinx immigrants); García Hernández, Migrating to Prison, supra note 69, at 73–74 (noting that most detained migrants are Latinx); Kelly Lytle Hernández, Khalil Gibran Muhammad & Heather Ann Thompson, Introduction: Constructing the Carceral State, in THE JOURNAL OF AMERICAN HISTORY 18, 18 (2015) (noting that "[B]lack and Latin[x] [inmates] make up [seventy-two] percent of the federal prison population" as well as a "majority of . . . state prison populations"); Sreenivasan et al., supra note 204, at 4 ("[T]he majority of detainees were issued to persons originating from Latin American countries.").

\textsuperscript{406} See Pham & Van, supra note 70, at 464–68 (documenting this phenomenon based on analysis of millions of traffic stops).


agency official from deporting a group of noncitizens or compel local jailers to keep a noncitizen in custody when their own authority expires. When the regulatory target of law itself is in flux, when the core activity of human social and economic interaction is liminal itself, changing as people change, as society changes, as economics change, liminal rules arise to flex the joints of legal change.